Central Law Journal.

ST. LOUIS, MO., JANUARY 3, 1908.

WHERE ONE OF TWO PARTICIPATING MORTGAGEES PROCEEDS TO FORECLOSURE OF THE MORTGAGE, ABSORBING ALL THE PROCEEDS, TO THE EXCLUSION OF HIS JOINT MORTGAGEE, WHAT IS THE REMEDY OF THE EXCLUDED CO-MORTGAGEE?

It is a principle of law which we take it will not be seriously disputed, that the execution or indorsement of a note and mortgage to two indorsees entitles each of them, as co-mortgagees as well as co-indorsees, to one-half of the note and its proceeds, and to one-half the mortgage security, and that neither can transfer any other or greater interest therein. Herring v. Woodhull, 29 Ill. 92, 81 Am. Dec. 296. But suppose several notes are made to one person, falling due at different times, and afterwards assigned to different parties at different times, what then is the rule as to priority? On this question the authorities diverge. In Florida, Illinois, Indiana, Iowa, Kansas, Missouri, Ohio, Virginia and Wisconsin, the rule obtains that priority is to be determined in the order of the maturity of the notes secured by the mortgage, the notes maturing first being satisfied in full before notes falling due at later dates. In Alabama, the rule is that the assignees of the notes are entitled to priority in the order in which they were assigned, the first assignee of any of the notes being preferred to a later assignee. In Arkansas, California, Minnesota, Mississippi, Nebraska and Vermont, the courts lay down the rule that all mortgagees should share pro rata in the distribution of the mortgage fund.

There are a great many authorities on the particular phase of this question, referred to in the preceding paragraph, which we have not thought best to cite or to discuss at the present time, preferring to narrow down the question here to be discussed to a case where the notes are due originally to different parties. In such cases, we do not believe, whatever the rule might be as to different assignees, that there should exist or that there does exist any rule of priority in favor of any co-mortgagee unless there is an express stipulation in the mortgage agreement to that effect.

Thus, in Ohio, which adheres to the rule that different assignees from the same mortgagee are entitled to priority in the order of the maturity of the notes so assigned to them, it has been held that this rule has no application to a case of several original mortgagees. Coons v. Clifford, 58 Ohio St. 480. In this case a single mortgage was made to secure two notes, one to Mr. A., falling due May 3, 1891, and the other to Mr. B., falling due August 14, 1891. The proceeds on foreclosure being insufficient to satisfy both notes, Mr. A. insisted that he be paid in full for the reason that his notes matured first. But the Supreme Court of Ohio refused to extend the rule which controls the priority between different assignees of one original mortgagee to a case of two original mortgagees, holding notes falling due at different times, and held that in such cases it is the evident intention of the parties to give neither of the two mortgagees any priority. This is also the rule laid down in Fielder v. Varner, 45 Ala. 429, where it is held that when several debts are secured by a mortgage, for some of which debts there are sureties who are not parties to the mortgage, the mortgagee becomes the trustee for the sureties to the amount of the funds thus provided for their indemnity; and that upon a sale of the mortgaged property, the mortgagee must see that their just proportion of the proceeds of the sale is applied to the discharge of the debt on which the sureties are bound. The same rule is applied in the case of Shaw v. Newsom, 78 Ind. 335, where the court holds that a single mortgage, given to secure obligations given to different parties maturing at different times, is equivalent to the simultaneous giving of separate mortgages to secure such obligations, and, no priority is to be allowed. It would be otherwise, of course, if the obligation were payable to the same party and had passed into the hands of different owners.

As to the proper proceeding to be taken in such a case by an excluded co-mortgagee we apprehend that his proper move is to again foreclose the property which is the security for his obligation. This proceeding is authorized by the opinion of the court in the well-reasoned case of Goodall v. Mopley, 45 Ind. 355. In this case a debtor executed one

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mortgage to several different creditors. After maturity of all the claims, a part of the mortgagees foreclosed without making a certain other mortgagee a party to the proceeding. After the decree and before sale of the property under it, the latter commenced his action to foreclose the mortgage, making the debtor and all the other mortgagees parties. The court held that the foreclosure proceeding to which he was not a party did not affect his rights under the mortgage. The court also held that he could maintain his action, and in it have his rights and those of other mortgagees determined. The court further held that since the mortgage secured all the claims which it included, no mortgagee could be excluded from equal partjcipation on the ground that the obligation of some other mortgagee had matured sooner.

NOTES OF IMPORTANT DECISIONS.

APPEAL AND ERROR—WHAT IS MEANT BY A DECISION ESTABLISHING THE "LAW OF THE CASE."—That attorneys may be informed exactly what is meant by the phrase, the "law in the case" we call especial attention to the opinion of the Supreme Court of California in the recent case of Tally v. Ganahl, 90 Pac. Rep. 1049, where that court lays down the rule that where, on appeal, the supreme court states a principle or rule of law necessary to a decision, that principle or rule becomes the law of the case, and must be adhered to throughout its subsequent progress both in the trial court, on a subsequent appeal, and in a subsequent suit on the same cause of action, though on its subsequent consideration of the case the supreme court may be of the opinion that the former decision was erroneous.

The court expressed its views on this question as follows: "The principal point decided by this court on the former appeal was that, under the terms of the contract, and upon this court's conception in that case of the theory upon which the plaintiff based his right to recover, it was an essential condition precedent to such recovery that the architects of the building should have audited and certified the expense incurred by the owner in completing the building and the damage caused by the failure of the contractor to perform. No such certificate having been made, so far as was shown by the record in the case, the judgment was reversed. This ruling, appellant claims, has become the law of the case, binding and conclusive in this action, not only upon the superior court, but upon this court and on this appeal as well. The respondent contends that the doctrine of the law of the case does not apply where the action in which the ruling was made is subsequently dismissed without prejudice, and a new action begun upon the same cause. The contrary has been held in a case where, after a decision on the defendant's appeal, reversing the judgment because a certain power of attorney was insufficient to authorize the particular conveyance on which plaintiff relied, the defendants began a new suit in equity to enjoin further claims under the void conveyance. Portland Tr. Co. v. Coulter, 23 Oreg. 131, 31 Pac. Rep. 280. It was also held in that case, however, that the former construction of the power was correct. But, for the purposes of this case, we think it better to assume, without deciding the point, that the doctrine laid down in Tally v. Parsons is binding in this case, so far as it presents precisely the same question. We think the ruling there made does not apply here. The doctrine of the law of the case is this: That where, upon an appeal, the supreme court, in deciding the appeal, states in its opinion a principle or rule of law, necessary to the decision, that principle or rule becomes the law of the case, and must be adhered to throughout its subsequent progress, both in the lower court and upon subsequent appeal, and, as here assumed, in any subsequent suit for the same cause of action, and this, although in its subsequent consideration, this court may be clearly of the opinion that the former decision is erroneous in that particular. Sharon v. Sharon, 79 Cal. 633, 22 Pac. Rep. 26, 131; Wixon v. Divine, 80 Cal. 386, 22 Pac. Rep. 224; Mattingly v. Pene, 105 Cal. 516, 39 Pac. Rep. 200, 45 Am. St. Rep. 87; People v. Thomson, 115 Cal. 160, 46 Pac. Rep. 912. Indeed, it is only when the former rule is deemed erroneous that the doctrine of the law of the case becomes at all important. It is a necessary concomitant of this doctrine, that the former ruling is not binding upon the second hearing, except as to questions which involve and are controlled by the same principle. Mattingly v. Pennie, *supra*."

CONCERNING UNCERTAINTY AND DUE PROCESS OF LAW.

Nowhere in encyclopedias or text books have I been able to find any discussion as to the relationship between uncertainty in statutory enactments, and the constitutional requirement of due process of law. The subject is of special importance in the criminal laws where in late years we find innumerable enactments in which epithetic vituperation and judicial legislation serve in lieu of a necessary statutory exactness in definition of that which it is intended to prohibit. In the judicial decisions to be here-

after cited the subject is of course discussed somewhat, but all of them combined hardly constitute anything like a comprehensive survey of the question. That is the reason for this disquisition.

That a deprivation of liberty or property may be due process of law, two things must occur. First there must be a valid "law," within the meaning of that word in the constitutional phrase "due process of law," and secondly the process prescribed by that law must be accurately pursued. Here I am directly concerned only with one phase of the question: what is essential as to the content of a legislative enactment to make it a criminal "law" within the meaning of the constitution? Judicial opinions have often commented upon uniformity and universality of application, to all who in the nature of things are similarly situated, as an essential to the very existence of a law. Here it is proposed only to discuss the effect of uncertainty in a criminal statute, as related to the non-existence of "law," because under such uncertain statutes, courts must indulge in constitutionally prohibited judicial legislation; and because statutory uncertainty excludes the requirements of uniformity of application to all who are naturally similarly situated. In other words it is proposed to resurrect the ancient maxim "*Ubi jus incertum ibi jus nullum*" (where the law is uncertain there is no law) and to make it a rule for the interpretation of the "due process of law" clause of our constitutions.

In order that my conclusions may not be discredited by the use of false analogies I deem it wise to begin with a short analytical statement which will differentiate the problem which I propose to discuss from kindred problems arising from uncertainties of other than criminal statutes, and the probable different effect which uncertainty may produce in different classes of legislation. Even though the preliminary discussion may be superficial, it seems needful since I have nowhere found any general discussion of the subject.

Uncertain Statutes Classified.—It is conceivable that some civil enactment of a legislature would merely be an effort verbally to declare, and legally to establish and maintain, some rule of natural justice which is inherent in the nature of things and of the social organism. Uncertainty in such a statute, resulting from an unfortunate choice of words, could do no serious injustice even though the court, either by legitimate construction or judicial legislation, would make it certain, if in doing so nature's rule of justice was not violated, nor artificial penalties inflicted. It is probable that uncertainty in such a statute would not necessarily effectuate its annulment. At any rate I exclude that class of cases from my discussion. A second class of statutes which might be objected to because of uncertainty, are those which create artificial civil remedies for the maintenance of natural justice. Here ambiguity and uncertainty can again be judicially eliminated in accordance with the legislative intent, if that is reasonably ascertainable from the act itself, and no injury result to innocent parties, because the postulate was that the maintenance of natural justice was the only end to be achieved by the use of this new artificial remedy. For the same reason such laws may also be retroactive.[1]

The third class of uncertain statutes are such as declare a rule of justice not derived from nature as such, but finding its foundation in some artificial condition of legislative creation. The limitation of the liability or rights of corporate stockholders might be an illustration. When in such legislation the effect is to curtail the responsibility which naturally should flow from one's act, great exactness in expressing the legislative intent to that effect would be required, since every intendment must be indulged in favor of the natural consequences of natural justice as operating under natural conditions. But I am not going to discuss this either. I have mentioned these classes only to point out superficially their probable difference from the next class, so that, in the mind of the reader, my argument may not be subjected to unmerited discredit, because of the thoughtless use of false analogies.

The fourth class of legislation, of which uncertainty may be an attribute, includes all those laws which are intended to create and enforce artificial rights or which are punitive in their character. The relationship of "due process of law" to an uncertainty in the statutory specification of that which is

[1] Chamberlain v. City of Evansville, 77 Ind. 551; Davis v. Ballard, 1 Marshall (Ky.), 579.

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made punishable by it, is the special matter here to be discussed.

Every state in the union has from one to several score of penal statutes in which no words of exact meaning serve to define with any certainty what it is that is prohibited. In the last thirty years, under only one class of these uncertain statutes, about 4,000 convictions have been secured, and it is fair to assume that under all others including an infinite variety of vague municipal police regulations there have been some 20,000 more citizens deprived of liberty and property and yet, seemingly no one has ever doubted that a conviction under such statutes constitutes due process of law. This makes me wonder if I am dreaming or if the whole rank and file of the bar and judiciary have forgotten, the original meaning and purpose of "the law of the land." I do not even except the Supreme Court of the United States, because it, like all the appellate courts of all the states, have repeatedly enforced such laws without a doubt ever crossing its mental horizon, either originating with the court or the attorneys appearing there to argue in such cases.

The most conspicuous and most generally approved examples of these many and outrageously uncertain laws, are those which in various ways penalize "indecent, obscene and disgusting" literature and art. Those who need to have a concrete example in mind, while the discussion proceeds, may be thinking of those laws as a sample of many others which must be annulled if my contention is correct.

Uncertain and Ambiguous Statutes Distinguished.—First of all we must bear in mind the distinction between an ambiguous statute and an uncertain one. An ambiguous statute I conceive to be one which is expressed in words some of which have several different meanings, either, or some of which meanings, would leave the statutory signification so certain as not to require any additional words to make its meaning plain and uniform beyond doubt, to every man of average intelligence. When that is the case the problem is one of construction, in the method of which due regard is to be had, first for the liberty of citizens and second for the legislative intention, which however must be gathered exclusively from the words of the act itself. The rules for statutory construction will always protect the defendant, so he shall not be punished if there be any reasonable doubt as to whether his act necessarily comes within the very letter of all of the possible meanings of the statutory prohibition. If it does not come within every possible interpretation of the legislative language then the accused must have the benefit of the doubt under the rule of strict construction. In a statute which is only ambiguous, we can thus avoid all possibility of raising the constitutional question which I am proposing to discuss. If in criminal cases such rules for a strict construction do not safeguard the liberties of citizens, they are convicted under judicial legislation, and not by "due process of law."

By an uncertain statute, as contradistinguished from an ambiguous one, I mean a statute which is uncertain because incomplete in its description of the artificial rights created by it, or the act which it proposes to punish. Thus an uncertain statute is one which, when applied to undisputed facts of past or present existence, is incapable of any literal enforcement, or incapable of enforcement with absolute certainty and uniformity of result, except by the judicial addition of words, or tests, which may or may not have been intended by the legislature, but which are not unavoidable implications from the statutory language alone. It will be contended that such an uncertainty in a statute, creating an artificial right or punishment, makes the enactment unconstitutional because in its practical operation and enforcement it unavoidably involves *ex post facto* judicial legislation in defining the crime, and therefore is not "due process of law," and is an arbitrary government of men and not of law. As to the requirement of certainty in laws creative of artificial civil rights, see cases cited in note.[2]

Uncertainty of Evidence and of Law Distinguished.—These generalizations can hardly provoke much antagonism. It therefore seems to me that the difficulty lies chiefly in a clouded vision concerning their application to concrete facts. We shall presently see how in some instances it is not at first clear whether the uncertainty is inherent in the

[2] Blanchard v. Sprague, Fed. Case No. 1517, Vol. 3, p. 647, and cases. Also, Bittle v. Stuart, 34 Ark. 229-232; Ferrett v. Atwill, 1 Blatchford, 157.

statute or arises from doubt as to the probative value of the evidence adduced under it. We must also bear in mind the difference between uncertainty which arises because the statute attempts to make guilt depend, not solely upon facts of present or past existence, but also requires a decision upon an essential element of the crime concerning speculative and problematical tendencies towards future results, of such a character as are undeterminable with accuracy and uniformity by the known laws of the physical universe. Again we must observe the difference between a doubtful sufficiency of evidence to establish a fact of past or present existence, and which beyond all question is of a demonstrable character, and that other case of doubtful sufficiency of evidence to establish a fact, not of past or present material actuality, and which from its very nature is therefore incapable of certain demonstration, under the known laws of the physical universe, but is by the statute required to be proven as an element of the crime. In the former case the uncertainty of guilt or innocence is not chargeable to uncertainty of the statute. In the latter case it is wholly due to such uncertainty, because a conclusion as to the present existence of an unrealized, non-physical or psychologic tendency, is but an unsupported belief as to the doubtful possibility of a future doubtful event. Where such an uncertainty inheres in the statute itself, and is of the essence of the crime it attempts to define (as is the case with our obscenity statutes and the judicial legislation creating tests of obscenity), then in the very nature of things guilt must always be determined by surmise, speculation, caprice, emotional association, ethical sentimentalizing, moral idiosyncracies or mere whim on the part of judges or jurors. Punishment for such a "crime," or under such a statute is the arbitrary deprivation of property, of liberty, or both, according to the dictates of men not vested with legislative authority, and therefore is not according to "due process of law."

Uncertainty Concerning the "Obscene."—In the obscenity statutes there is no question of construing involved verbiage, but solely one of defining the word "obscene." Let us first clearly understand what we mean by a "definition." If the word "water" had been used in a statute, every average man would at once translate that word into the same general mental picture. Every such reader would probably define the word "water" as standing for a certain transparent, odorless fluid, of the identical kind with which he, and every one else, has had abundant experience. There never would arise in any man's mind any doubt as to what concrete concept the general word "water" symbolized, even though it might become a matter of inquiry, whether a particular substance was water or peroxide of hydrogen. That doubt is not as to the meaning of the word, but one concerning the past or present existence of the corresponding objective fact; one of classifying the matter as water. When such an issue has arisen we do not resort to a definition of the word, for the purpose of making certain what concept the word "water" was intended to convey; instead, we call in experts to apply the chemical tests by which the objective material, "water," is differentiated from peroxide of hydrogen.

To determine the classification of a particular substance we apply mathematically exact and always uniform tests, not created by statute and not a part of a judicial definition of any word used in the statute. If such exact tests exist in the nature of things there would be no occasion for legislatures or courts to prescribe them. If they do not exist in the nature of things the legislature has the right and power to create its own artificial tests or definitions, but in a criminal statute they must be of equal certainty with the ascertained laws of the physical universe. If neither science nor the statute furnishes us with a definite test by which to determine the existence of those things expressed by statutory words and which are essential to a definition of a crime, then the law is void for uncertainty and the lack of statutory tests of criminality cannot be supplied by the courts since that would be judicial criminal legislation and *ex post facto* at that.

If such tests were not a matter of exact science, but merely a matter of speculation, or necessary judicial creation in the attempt to enforce such an uncertain law, then they would be unconstitutional judicial legislation and not definition nor statutory interpretation. Furthermore, if such tests are not of mathematical certainty, then the law would be a

nullity because "where the law is uncertain, there is no law." Let us now keep in mind the word "water" (in contrast with the word "obscene,") and the character of those differentiating tests, not of statutory origin, nor necessarily implied in the statutory words, but by which we, as a matter of physical science, distinguish the substances of that for which the words stand.

With the foregoing distinction in mind, I affirm that no court has ever defined and no human can define the word "obscene" so that every reader, even with the help of the test, or definition, must receive therefrom the same concrete mental picture. The reason obviously is, that unlike the word "water," the word "obscene" stands for no particular concrete objective quality, but always and ever stands for an abstraction, in which is generalized only subjective states, associated with an infinite variety of objectives, and therefore in the concrete it will always have a different significance for every individual, according to what he has personally abstracted, from his peculiar and personal experience, and classified according to his own associated emotions of disapproval, and included within his personal generalization "obscene." Each individual therefore reaches a judgment about obscenity according to his own ever-varying experiences, and the peculiarly personal emotional associations (of approval or disapproval) which are evolved from these, as well as the degrees of his sexual hyperaestheticism.[3]

From this indisputable fact, it follows that the word "obscene" is indefinable as a matter of science and the criminal statute, of which that word is an indispensable element, is void, because "where the law is uncertain, there is no law," and no "due process of law."

We must make still clearer, if possible, the difference between the uncertainty of the "obscene" and other remotely similar uncertainties. Some will ask, is not the uncertainty of the existence of a special intent which sometimes is made an essential element of a crime, just as uncertain as the unrealized psychologic tendencies of a book, which are the judicial test of its obscenity? I answer "No!" The existence of that intent as to past acts is in its nature a demonstrable fact. The accused if he would tell the truth could settle it beyond a doubt. Here the uncertainty is one of evidence not of statutory tests of crime. An unrealized psychologic potential tendency of a book upon its hypothetical future reader, has only a speculative future existence, not determinable with exactness by any known law of the physical universe, and therefore is not a demonstrable fact but one that we only guess at, and as to which neither the accused, nor any one else, can furnish certain information, nor have any certain advance knowledge, as to just exactly what will induce the court or jury to judge it to be criminal. The criminal intent of a man charged with crime is a fact which in point of time antedates the indictment and verdict, and has such prior existence objectively to the mind of the juror or trial court. Not so with obscenity. The tests by which juries are instructed to determine the existence of "obscenity," depends upon their speculation about the psycholgic tendency of a particular book, upon a future hypothetical reader, which tendency has not yet become actualized at the time of indictment or trial, and which psychologic tendencies are not known to us to be controlled by any exact known law having the immutability of the physical laws of our material universe. It follows that unlike specific intent, which is a demonstrable fact of past existence and objective to the mind of the court, the unrealized psychologic tendency, by which a particular book is judged "obscene," has no demonstrable existence except as a belief about a doubtful future possibility, and existing exclusively as a mere belief in the mind of the trial judge or jury, and without any known proven or provable present, corresponding objective. Such an uncertainty is one of law and not of evidence, because it arises out of the fact that the statute (or the judicial legislation under it as to the tests of obscenity) predicates guilt upon a conclusion about an undemonstrable factor of speculative future existence.

No legislature has the power to penalize travel in an automobile at a "dangerous speed," and leave to the trial court or jury

[3] See "What is Criminally Obscene" in Albany Law Journal, July, 1906: "Legal Obscenity and Sexual Psychology—" in the Medico-Legal Journal, September and December, 1907; also "Freedom of the Press and Obscene Literature," a pamphlet published by The Free Speech League, 120 Lexington avenue, New York, Am. Jour. of Eugenics Dec. 1907.

to say in each case whether the speed is dangerous or not. What is a "dangerous" speed is a legitimate subject for the exercise of legislative discretion, and is determinable only by the legislature, and its authority cannot be delegated to the varying judgments of varying juries. So likewise what is to be deemed of dangerous moral tendency is a matter exclusively of legislative discretion, and must be determined and definitely fixed by decisive definition of the law-enacting power, and the formulation of tests cannot be delegated to the varying judgments of varying courts or juries. Since the "obscenity" of a book is not by the statute defined to consist in any of its sense-perceived qualities and since therefore the legislature has not completed nor expressed its legislative discretion to decide what is deemed to be of "dangerous tendencies," and since that legislative function cannot be delegated to the jury or judge to be exercised *ex post facto* or otherwise, it follows that there is no law upon the subject and no due process of law in any such prosecution.

On the Certainty Essential to the Validity of a Criminal Statute Against Obscenity.—To constitute a valid criminal law the statute under consideration must so precisely define the distinguishing characteristics of the prohibited degree of "obscenity" that guilt may be accurately and without doubt ascertained by taking the statutory description of the penalized qualities and solely by these determine their existence in the physical attributes inherent in the printed page. Judicial tests of "obscenity" cannot be read into the statutory words. Nor can official or judicial speculations (of a character not calculated to discover such definitely penalized physical qualities in the book), be permitted so long as they deal only with a mere unrealized psychologic potentiality, for influencing in the future some mere hypothetical person. Such speculative psychologic tendencies are never found with certainty in any book, but are read into it, with all the uncertainty of the *a priori* method, as an excuse for a verdict of guilty. Even if the legislative body attempted to authorize such a procedure it would be a nullity under the maxim "Where the law is uncertain there is no law." Therefore such procedure cannot be "due process of law." An unrealized psychologic tendency cannot be made the differential test of criminality, although such tendency may properly appeal to the legislative discretion and may properly result in penal laws wherein the statutes and not the courts, specify the tests, definite and certain, by which to determine what it is that is deemed to possess the criminal degree of such dangerous tendency.

General Statement as to the Required Certainty of Criminal Statutes.—We now come to the contention that a criminal statute cannot constitute "due process of law," unless it is general, uniform, fixed and certain. These qualities are all more or less related since if a law is not fixed and certain it can seldom be general and uniform in its applications. Now we are specially interested to get a more condensed summary as to what is meant by the requirement of fixity and certainty, in a statute.

Our claim is that a criminal statute to constitute "due process of law," must define the crime in terms so plain, and simple, as to be within the comprehension of the ordinary citizen, and so exact in meaning as to leave in him no reasonable doubt as to what is prohibited. Those qualities of generality, uniformity, and certainty, must arise as an unavoidable necessity out of the very letter of the definition framed by the law-enacting power, and not come as an incidental result, from an accidental uniformity in the exercise by courts of an unconstitutionally delegated legislative discretion. If a statute defining a crime is not self-explanatory but needs interpretation or the interpolation of words or tests to insure certainty of meaning, or because its ambiguity permits of more than one judicial interpretation, then it is not the law of the land, because no such selected interpretation of the courts has ever received the necessary sanction of the three separate branches of legislative power, whose members alone are authorized and sworn to define crimes and ordain their punishment. Laws defining crimes are required to be made by the law-making branch of government because of the necessity for limiting and destroying arbitrariness and judicial discretion in such matters. That is what we mean when we say ours is a government by laws and not by men. It follows that it is not enough that uniformity and certainty shall come as the product of judicial discretion, since "law" is necessary for the

very purpose of destroying such discretion in determining what is punishable. No single authority taken by itself justifies all the contentions which I have generalized herein above. Yet every separate portion of the generalization has some support in some creditable authority. My effort has been to generalize all that I have gathered from a perusal of all of the following authorities cited in the note.[4]

In the arrangement of the cases cited in the note I have placed first those which afford the historical back ground for interpreting the words "law of the land." The subsequent cases are in the main so arranged that if the pertinent judicial utterances were quoted and compiled they would lead gradually to an argumentative climax. That means that the cases towards the end of the list are the more scopeful in their language and most potent towards establishing the unconstitutionality of criminal statutes which fail to define crimes with such certainty that all persons of ordinary intelligence may know exactly what it is their duty to avoid.

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[4] English Liberties (1774), pp. 21 to 27. and 64 especially; Blackstone's Introduction to book 1, p. 53; Montesquieau, vol. 1, Spirit of the Law, pp. 92, 232, Aldine Edition; Baccaria, Essay on Crimes, etc. (1775), pp. 12 to 41; Aukland, Principles of Penal Law (1771), pp. 313, 314; Black's Law Dictionary, p. 1196; Bouvier's Law Dictionary, Rawle's Rev., vol. 2, p. 381; Hughes on Procedure, vol. 2, pp. 1003, 1007, 1237; Hamilton in The Federalist, p. 484, 487, 490; Godwin's Political Justice (1796), p. 289; Livingston's Report to General Assembly of Louisiana (1830), pp. 17, 18, 113, 118; Rex v. Bond, 1 Barn. & Ald. 392; United States v. Sharp, Peters C. C. 118, Fed. Case No. 16264; United States v. Brewer, 139 U. S. 288, 11 Sup. Ct. Rep. 538; United States v. New Bedford Bridge Co., Fed. Case No. 15867; McClusky v. Cromwell, 11 N. Y. (1 Kern.) 593; United States v. Garretson, 42 Fed. Rep. 25; United States v. Whittier, Fed. Case No. 16688; Sutherland on Statutory Construction, 1st Ed. 438, 439; Baker v. Page, 29 Pac. Rep. 787; United States v. Bassett, Fed. Case No. 14539; United States v. Wiltberger, 5 Wheaton, 95; Ferritt v. Atwill, 1 Blatchford, 157; Dent v. West Virginia, 129 U. S. 114; Millett v. People, 117 Ill. 294; Bank of Columbia v. Oakley, 4 Wheaton, 235; Wally's Heirs v. Kennedy, 2 Yerg. 599; State v. Doherty, 60 Mo. 504; State v. Bates, 14 Utah, 293; Enterprise, Fed. Case No. 4499; Blanchard v. Sprague, Fed. Case No. 1517; James v. Bowman, 190 U. S. 127; Davil v. Ballard, 1 Marshall (Ky.), 577; Bittle v. Stewart, 34 Ark. 229, 232; Hon. A. B. Jones before New Mexico Bar Ass. (1894), p. 20; United States v. Sharp, Fed. Case No. 16264; United States v. Clayton, Fed. Case No. 14814; United States v. Hartwell, 73 U. S. (6 Wall.) 396; United States v. Dwyer, 56 Fed. Rep. 468; Seat of Government Case, 11 Wash. Ter. Rep. 123; Thornton v. Lane, 11 Ga. 461, 488, 494, 538; Evansville St. Ry. Co. v. Meadows, 13 Ind. App. 159; McJunkins v. State, 10 Ind. 145; United States v. Commerford, 25 Fed. Rep. 904; Tozor v. United States, 52 Fed. Rep. 919; Chicago, etc., Ry. Co. v. Dey, 35 Fed. Rep. 866, 867; United States v. Reese, 92 U. S. 219, 221; United States v. Mathias, 146 Fed. Rep. 308; United States v. Eaton, 144 U. S. 687; *Ex parte* Jackson, 45 Ark. 164; Louisville v. Com., 35 S. E. Rep. 130.

CONSTITUTIONAL LAW—SEIZURE OF GAMBLING DEVICES.

J. B. MULLEN & CO. v. MOSLEY.

Supreme Court of Idaho, June 6, 1907.

Section 4 (Laws 1899, p. 390) of the anti-gambling act, which authorizes the summary seizure and destruction of gambling devices, is a constitutional and legitimate exercise of the police power of the state for the suppression and prevention of crime and the protection of the public morals and welfare of the state.

The police authorities of the state may be properly invested with power and authority to seize and destroy public nuisances, and to seize such instruments and devices as are designed and intended for use in the commission of crime.

Gambling itself was a nuisance at common law, and is a crime under the statutes of this state, and the machines, instruments, and devices designed and intended for carrying on such nuisance and crime are themselves nuisances.

AILSHIE, C. J.: This action was commenced by the plaintiffs to recover a number of "slot machines" from the defendant, who was then sheriff of Ada county. The cause was determined in the district court on an agreed statement of facts, and judgment was entered against the plaintiffs and in favor of the defendant for his costs. The plaintiffs have appealed from the judgment.

It is stipulated, among other things, as follows: "That on or about the 23d day of March, 1905, plaintiff was and now is the owner of the following described personal property, to-wit: Six (6) Mills' slot machines, numbered 8,592, 6,171, 12,232, 8,392, 751 and 661, respectively, one (1) Wattling machine and two Gable slot machines of the value, if of any value at all, of one hundred and twenty-five (125.00) dollars. That said defendant came into the possession of said property lawfully. That before the commencement of this action, to-wit, on the 20th day of January, 1906, plaintiff demanded the possession of said property from the defendant, but to deliver the same, or any part thereof, defendant refused and still refuses, and withholds the possession thereof from the plaintiff, to his damage, if to his damage at all, in the sum of one (1.00) dollar. * * * That said property above described are gambling devices, and were devised, and are designed

and constructed for the sole and only purpose of playing games of chance for money, and are not adapted to any other use or for any other purpose, and are devised and adapted solely, entirely, and only to the betting of money, at which money is lost or won, and are not capable, susceptible, or fitted to be devoted or used in, or for any other purpose or purposes. That at the time said machines were originally seized by constable A. Anderson, and for some days prior thereto, said machines were all being used for the sole purpose of playing games of chance at which money was bet and won or lost, in Boise, Ada county, Idaho. That on the 22d day of October, 1904, information in writing and under oath was presented to W. C. Dunbar, a duly elected, qualified, and acting justice of the peace in and for Boise Precinct No. 2, Ada county, Idaho, as such justice of the peace, that gambling devices, to-wit, the slot machines mentioned and described herein, were within the city of Boise, Ada county, Idaho, and within the jurisdiction of said justice of the peace, and were there and then in operation, and used as such gambling devices, and particularly described said machines, and the places where the machines were then situate. That thereupon said Dunbar, as and acting as such justice of the peace, thereafter issued warrants, directed to the sheriff or any deputy sheriff or constable of said county, commanding that the said gambling devices, the said slot machines mentioned and described herein, and other slot machines, be seized and brought before him in his office in Boise, in said county and state, to be dealt with according to law, and thereafter placed the said warrants in the hands of A. Anderson, a duly elected, qualified, and acting constable of said precinct, who under and by virtue of said warrants seized said slot machines and brought the same before said justice of the peace, to be dealt with as directed by the statutes in such case made and provided."

It is further stipulated that after the machines were brought before the justice of the peace, and after an inspection thereof by the justice and his ascertainment that they were gambling devices, and designated for the purpose of playing games of chance, the justice made his order, commanding and directing that the machines be publicly destroyed; that prior to the destruction thereof an action was commenced in the district court for the recovery of the machines by the Mills Novelty Company against the justice of the peace, W. C. Dunbar, and that it was thereupon stipulated and agreed that during the pendency of the action in claim and delivery the property should be delivered to and held by the sheriff of the county. The case of the Mills Novelty Company v. Dunbar was heard and determined in the district court, and thereafter upon appeal to the Supreme Court (83 Pac. Rep. 932, 11 Idaho, 671), and the judgment was in favor of the defendant. Upon the determination of that case this action was commenced by these plaintiffs against the sheriff, claiming the specific articles herein enumerated. The order for the destruction of these machines was had in conformity with and under the provisions of sections 1 and 4 of the act approved February 6, 1899 (Sess. Laws 1899, pp 389, 390), and known as the "anti-gambling law. Those sections are as follows:

"Section 1. Every person who deals, plays or carries on, opens or causes to be opened, or who conducts, either as owner, employee, or lessee, whether for hire or not, any game of faro, monte, roulette, lansquenet, rouge et noir, rondo, or any game played with cards, dice, or any other device, for money, checks, credit or any other representative of values, is guilty of a misdemeanor and punishable by fine not less than two hundred dollars or imprisonment in the county jail not less than four months."

"Sec. 4. Whenever any judge or justice of the peace shall have knowledge or shall receive satisfactory information that there is any gambling table or gambling device, adopted or devised and designed for the purpose of playing any of the games of chance prohibited in section 1 of this act, within his district or county, it shall be his duty to forthwith issue his warrant, directed to the sheriff or constable, to seize and bring before him such gambling table or other device, and cause the same to be publicly destroyed, by burning or otherwise."

The appellant attacks section 4 of this act on the ground that it is in violation of section 13, art. 1, of the state constitution, which provides, among other things, that "no person shall * * * be deprived of life, liberty or property without due process of law." Counsel for appellants insist that the summary seizure and destruction of property as provided for in section 4 of the act amounts to depriving him of his property "without due process of law." Counsel for respondent urge, in the first place, that, since appellants have stipulated and agreed that these "machines are gambling devices designed and constructed for gambling purposes and incapable of being used for any other purpose," they cannot, therefore, maintain their action in claim and delivery for the recovery of the same. In support of this contention on the part of the respondent, he cites Spalding v. Preston, 21 Vt. 10, 50 Am. Dec. 68; Board of Police Com'rs v. Wagner, 48 Atl. Rep. 455, 93 Md. 182, 52 L. R. A. 775, 86 Am. St. Rep. 423; State v. Robbins, 24 N. E. Rep. 978, 124 Ind. 308, 8 L. R. A. 438. Without reviewing the authorities or going into any extended consideration of the reasons presented in support of the principle they announce, we are content to hold that the appellants cannot maintain their action in replevin or claim and delivery for the recovery of articles that they admit are devised and constructed solely and exclusively for gambling purposes, and are only capable of use in violating the laws of this state. This court will not countenance an action looking to the recovery of such an article or articles. It is conceded that

the only possible value they can have is for use in violating the penal statutes of this state; that, in order to be valuable and command any price in the market, it is necessary that they be used in the commission of crime. The courts of this state will not permit any person or number of persons to maintain an action for injury to or recovery of an article of such character. The plaintiffs, under such circumstances, have no standing in court. They have no grievance to present to a court, and they will not be heard to cavil over the right of possession of instruments of crime.

We are content to rest our decision in this case upon the grounds above announced, but, since the validity of this provision of the anti-gambling law has been argued in this case and called in question in several other cases in this court, and has never been passed upon, and in view of the further fact that there is apparent laxity in the enforcement of this statute in some parts of the state, possibly growing out of a doubt as to its validity, we are impelled to express the opinion of the court in relation thereto. The leading and perhaps most numerously cited authority as to the validity of such a law is the case of Lawton v. Steele, 152 U. S. 133, 14 Sup. Ct. Rep. 499, 38 L. Ed. 385. This case was decided by the Supreme Court of New York (119 N. Y. 226, 23 N. E. Rep. 878, 7 L. R. A. 134, 16 Am. St. Rep. 813), and was taken to the Supreme Court of the United States on a writ of error. That case involved the validity of an act of the legislature of the state of New York prohibiting the taking of fish from certain waters within that state, and also authorizing the summary seizure and destruction of any nets or other means or devices for taking and capturing fish in violation of the provisions of the act. The proper officers seized a number of fish nets and summarily destroyed them, and it was contended that this action amounted to taking property without due process of law, and was, in that respect, in violation of the "due process" clause of the Constitution of the United States. The validity of the statute was upheld by the Supreme Court of New York, and the decision of that court was affirmed by the Supreme Court of the United States. The opinion of the latter court contains so much that is in point in the case at bar that we shall freely quote therefrom. In considering the power of the legislature to enact such a provision, the court says: "The legislature undoubtedly possessed the power, not only to prohibit fishing by nets in these waters, but to make it a criminal offense, and to take such measures as were reasonable and necessary to prevent such offenses in the future. It certainly could not do this more effectually than by destroying the means of the offense. If the nets were being used in a manner detrimental to the interests of the public, we think it was within the power of the legislature to declare them to be nuisances, and to authorize the officers of the state to abate them." Again, in considering the question of the value of the property thus destroyed, the court says: "But where the property is of little value, and its use for the illegal purpose is clear, the legislature may declare it to be a nuisance, and subject to summary abatement. Instances of this are the power to kill diseased cattle, to pull down houses in the path of conflagrations, destruction of decayed fruit or fish or unwholesome meats, of infected clothing, obscene books, or pictures, or instruments which can only be used for illegal purposes. * * * It is not easy to draw the line between cases where property illegally used may be destroyed summarily and where judicial proceedings are necessary for its condemnation. If the property were of great value, as, for instance, if it were a vessel employed for smuggling or other illegal purposes, it would be putting a dangerous power in the hands of a custom officer to permit him to sell or destroy it as a public nuisance, and the owner would have good reason to complain of such act as depriving him of his property without due process of law. But where the property is of trifling value, and its destruction is necessary to effect the object of a certain statute, we think it is within the power of the legislature to order its summary abatement. For instance, if the legislature should prohibit the killing of fish by explosive shells, and should order the cartridges so used to be destroyed, it would seem like belittling the dignity of the judiciary to require such destruction to be preceded by a solemn condemnation in a court of justice. The same remark might be made of cards, chips, and dice of a gambling room." In answer to the contention that it vested the officers with power to summarily determine, without notice, the character of the article, and whether or not it was such an article as came within the inhibition of the statute, the court said: "Nor is the person whose property is seized under the act in question without his legal remedy. If, in fact, his property has been used in violation of the act, he has no just reason to complain. If not, he may replevy his nets from the officer seizing them, or, if they have been destroyed, may have his action for their value. In such cases the burden would be upon the defendant to prove a justification under the statute." After citing a number of cases in support of its opinion, the court distinguishes the cases of Ieck v. Anderson, 57 Cal. 251, 40 Am. Rep. 115, Dunn v. Burleigh, 62 Me. 24, and King v. Hayes, 80 Me. 206, 13 Atl. Rep. 882, and criticises, as too restrictive and technical, the cases of Lowry v. Rainwater, 70 Mo. 152, 35 Am. Rep. 420, State v. Robbins, 24 N. E. Rep. 978, 8 L. R. A. 438, 124 Ind. 308, and Ridgeway v. West, 60 Ind. 371. Chauvin v. Valiton, 20 Pac. Rep. 658, 8 Mont. 451, 3 L. R. A. 194, and Brown v. City of Denver, 3 Pac. Rep. 455, 7 Colo. 305, are not in point in the case at bar, owing to the widely different state of facts on which they rest. Colon v. Lisk, 47 N. E. Rep. 302, 153 N. Y. 188, 60 Am. St. Rep. 609, involved the seizure and condemnation of vessels unlawfully engaged in taking oys-

ters and disturbing oyster beds. The right of trial by jury before condemnation was there claimed, and it was also held that the method prescribed by statute did not furnish the owner with a remedy amounting to "due process of law." It should be borne in mind that fishing vessels are not *per se* unlawful or a nuisance or incapable of a lawful use. On the contrary, they are of considerable value, and are designed and constructed for lawful and legitimate purposes, and their employment for unlawful purposes is the exception rather than the rule. In that case the court held that the act authorized an unreasonable and unnecessary exercise of the police power of the state; that neither the public morals, safety, nor the peace and order of society required such an exercise of the police power.

We are aware that many courts have held legislative acts similar to the one under consideration unconstitutional and void, on the grounds that they provide for taking property without due process of law. With the principles of law announced by those authorities we are in hearty accord; but to a statute like ours we cannot accord these principles the application given in many of the cases. The uniform holdings of this court have been along the lines of a liberal construction in favor of a due and ample exercise of the police power of the state, looking to the protection of the public morals and the maintenance of peace and quiet, as well as the protection of life and property. The determination of the means necessary to attain those ends primarily rest with the legislative department of the state government, and is always subject to the supervision and consideration of the courts established for that purpose.

In this case the articles or property, if they might be called such, seized are instruments of crime only. The most effectual method of preventing the crime is to destroy the specific instruments designed and kept for its perpetration. This is peculiar to the crime of gambling as to few other crimes. A man might commit murder with an implement of husbandry or the tool of an artisan, but for that reason the legislature would not be justified in directing the summary seizure and destruction of hoes and hammers, but it might with wisdom and propriety authorize the summary destruction of infernal machines. Under the police power of the state we prohibit the herding of certain live stock within a specified distance of a dwelling house. We kill diseased animals and quarantine against contagious and infectious diseases, and for the same reasons we destroy the devices and tools of the gambler, that the morals of the community may be protected from his contagion, and the peace and safety and prosperity thereof may not be invaded. Under the constitution no man's property may be taken without due process of law; but, when he invokes the protection of this constitutional provision, he must show that he is invoking it for the protection of something that is really property and falls within the meaning of that term. He is entitled to his day in court when his property rights are invaded, but this guaranty can scarcely be invoked where he seeks his day in court that he may dispute with the officers of the law the right of possession of instrumentalities, tools, and machines contrived and designed as a ready means to be directed against society, and in violation of the laws of the land in the commission of crime. In such case there can be no doubt of the power of the legislature to authorize a summary seizure and destruction of such instrumentalities and devices. It is generally difficult to detect and get hold of the players of unlawful and prohibited games on account of their alertness and ready means of locomotion, but the dumb instruments they leave behind, for obvious reasons, are always ready for business, and the law contemplates disabling them as a most effective way in which to prevent the recurrence of the offense. They are a menace to the welfare of the community and invite breaches of the law. The public authorities are required to destroy them for the same reason that they would destroy dies and plates for counterfeiting, or the stills and vats of the moonshiner.

It has been urged by counsel for appellants that, in order to authorize the destruction of these machines, it was necessary for the legislature to declare them a nuisance. The legislature has in effect done so. It has prohibited their use in any manner or form, and has also directed that, when any such instruments are found within this state, they shall be seized and destroyed. Making their use a crime and rendering them incapable of any legitimate use reduces them to the condition and state of a public nuisance which they clearly are. This amounts as effectually to declaring them a nuisance as if the word "nuisance" itself had been used in the statute. Gambling itself was a nuisance at common law, and is in no better plight now that it has been specifically designated as a crime by our statute, and it therefore appears that the instruments and devices by and with which it is carried on must themselves be nuisances. The following authorities sustain the validity of similar legislation: Board of Police Commissioners of Baltimore v. Wagner, 48 Atl. Rep. 455, 93 Md. 182, 52 L. R. A. 775, 86 Am. St. Rep. 423; Garland Novelty Co. v. State, 71 S. W. Rep. 257, 71 Ark. 138; Furth v. State, 78 S. W. Rep. 759, 72 Ark. 161; State v. Soucie's Hotel, 50 Atl. Rep. 709, 95 Me. 518; *Ex parte* Keeler, 23 S. E. Rep. 865, 45 S. Car. 537, 31 L. R. A. 678, 55 Am. St. Rep. 785; Glennon v. Britton, 40 N. E. Rep. 595, 155 Ill. 232; Bobel v. People, 50 N. E. Rep. 322, 173 Ill. 19, 64 Am. St. Rep. 64; Deems v. Baltimore, 30 Atl. Rep. 648, 80 Md. 164, 26 L. R. A. 541, 45 Am. St. Rep. 339. In 25 A. & E. Ency. (2d Ed.) 146, the author of the text says: "Articles which are designed to be used in violation of the criminal law may be summarily seized by the police authorities under a statutory power to prevent crime; and the seizure of such articles is not taking of property without due process of law within

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constitutional inhibition. So articles or instruments impressed with the characteristics of adaptation and intended and used for purposes prohibited by law and contrary to public health, peace, or morals are subject to summary seizure under statutory or general police regulations."

It has also been argued by counsel for appellants that the act is unconstitutional as being in violation of section 17 of article 1 of the constitution, which reads as follows: "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue without probable cause, shown by affidavit, particularly describing the place to be searched and the person or thing to be seized." That question cannot arise in this case, for the reason that it is admitted by the agreed statement that the sheriff came lawfully into the possession of these machines, and there is no contention that any unreasonable search or seizure was made. Garland Novelty Co. v. State, *supra*. Section 5 of the act provides that the officer who shall have charge of the execution of any warrant issued under section 4 thereof shall have all powers granted in cases of search warrants. Appellants contend that, under the foregoing provision of the constitution, no search warrant can be issued except upon affidavit of probable cause. That may be true, and, if so, the statute would still be read in connection with the constitutional provision, and the "knowledge or * * * satisfactory information" which the justice or judge must possess before issuing his warrant would have to be received in the form of and be conveyed by affidavit. It will be observed that the statute does not in terms dispense with the affidavit. It should also be borne in mind that section 8 of the act makes it a misdemeanor for any "county attorney, sheriff, constable or police officer" to refuse or neglect to "inform against * * * persons whom they have reasonable cause to believe offenders against the provisions of this act." It therefore appears that the law makes it the official duty of certain officers to "inform against" offenders. The question would naturally arise as to whether the search of a gambling house or seizure of gambling devices would be "unreasonable" under the provisions of this section of the constitution.

For the reason herein announced, the judgment of the trial court must be affirmed; and it is so ordered. Costs awarded in favor of the respondent.

Sullivan, J., concurs.

NOTE.—*Rights in and to Property Whose Only Use is an Illegal One.*—What property can be without the pale of the protection of the law is well demonstrated by the decision in the principal case, however the announcement of such a doctrine while it may be founded upon the soundest principles at first causes us to hesitate as to its soundness. The decisions sustaining the doctrine are not many. Although it is applied more or less in various doctrines respecting the enforcement of property rights, it is a plain recognition of the equitable doctrine that he who would invoke the aid of the court of equity must come into court with clean hands and further, that where the court finds that the parties have each been engaged in an unlawful manner it will neither afford protection to the rights of one or enforce those of the other.

If the court will not grant a writ of replevin to an article because the only use to which it could be applied is an illegal one, therefore it would properly follow, that it would neither enforce a contract, the consideration of which would be such property. Thus the maker of a slot machine if he sold the same could not collect payment for it, and likewise if a machine of that kind were stolen the offender would not be punished for larceny of the goods.

Indeed, in an Ohio case, in an inferior court, where the defendant was charged with burglary, the court charged the jury, "that if the things taken or destroyed were a kit of gambling tools or other implements made and used solely for the purpose of gambling, there could be no larceny of such things." State of Ohio v. Wilmore, 11 Weekly Law Bul. 321.

And no doubt it would likewise be held that if a person should willfully and maliciously destroy such property he could not be found guilty of the wilful and malicious destruction of property.

The decision in the principal case is careful to limit the doctrine to property whose sole and only use is for a use that is in violation of law. The reasons for this doctrine are set forth with clearness in the principal case. However as the court making the decision in the principal case is one of the newer states of the Union, it may not be inappropriate to quote from a decision made by the staid old Maryland court in the case of Board of Police Commissioners v. Wagner, reported in 93 Md. 182.

This case is very much similar to the Idaho case. Here it was sought to replevin a musical slot machine and the court held that such an action would not lie, likewise that the legislature had full power to authorize police officers in prevention of crimes to seize such instruments, saying: "It is fully sustained by the decisions in this court that the state has power to pass such laws as are necessary to protect the health, morals, or peace of society; and where the summary seizure, or even the destruction, of the offending thing is necessary for the public safety, may authorize that to be done; and such laws are not incompatible with those constitutional limitations which declare that no person shall be deprived of his property 'without due process of law.'" Deems v. Baltimore, 80 Md. 173, 26 L. R. A. 541, 30 Atl. Rep. 648; Mugler v. Kansas, 123 U. S. 623, 31 L. Ed. 215, 8 Sup. Ct. Rep. 273. In the case at bar the property seized under the concessions of the demurrer is an instrument "intended and designed to be used by the plaintiff and others in violation of the gambling laws," and one of such a character that "it can be put to no legitimate use." It does not, therefore, belong to the class of articles that may or may not be used for legal purposes. If it did, the presumption could not be made that the owner intended it for illegal purposes; and, however, the law may be otherwise, it is clear upon principle and authority that no seizure can be had before first being properly established that the article was procured and held for an illegal purpose. But if the article be of such a nature as to be incapable of being used for legal purposes, the presumption, as matter of fact, would be that, being an unlawful article, it was intended for such uses only as it was capable of being put to; and

in that the appellee, to rescue himself from the charge of having in his possession an evil chattel, would be forced to show that he did not intend to use it at all, but was keeping it for some innocent purpose,—as a curiosity, for instance. In Com. v. Coffee, 9 Gray, 140, where a person was indicted for the larceny of brandy in Massachusetts, where liquor could not be legally sold, it was contended that, having been bought to sell again, it was not the subject of larceny. The court held that, notwithstanding it could not be legally sold, it was a property because it did not appear "that it was procured and held for an illegal purpose." In that case the owner did not forfeit his right to the property because he held possession of the liquor, but because the illegal purpose of the possession had not been determined in the method the law pointed out. In the case at bar there can be no such difficulty, because by the demurrer it is admitted the machine was held for an illegal purpose, and could not have been used for any other. Monty v. Arneson, 25 Iowa, 383. So in State v. May, 20 Iowa, 308, a person was indicted for stealing liquor. The defense was that the sale of liquors was prohibited, but the court decided it was property that could be the subject of larceny, because "it may at any time be withdrawn as an article of trade, and be kept exclusively for private use." There are, however, "certain instances" in which "the law refuses its full protection to property because of its hurtful character, and on strict grounds of public policy." Thus, a burglar's or gambler's tools or counterfeit money may be seized and confiscated under appropriate acts. Schouler, Pers. Prop., sec. 24. It is difficult to perceive any sufficient reason for the denial of this principle. Why should a person be left in the possession of counterfeit money? To what use could it be applied, except an illegal use? If, on its seizure, the owner could show that it was not his *bona fide* intention to make any use of it at all, but was only keeping it as a memento, or as a curious object, perhaps another case would be presented. But, until that is made clearly apparent, it would have to be presumed that he intended to use it for the illegal purpose for which it was created, and for which it was only adapted. So, in the case at bar, no legal use can be made of the machine, and it would seem to follow, in the absence of proof to the contrary, that the appellee intended to put it to the illegal uses for which it was constructed, and for which alone it was capable of being used; and this would be so even if it were not admitted, as it is here, that its intended use was in violating the gambling laws of the state. What more effectual means for preventing crime than to deprive the thief or the burglar of the instruments of his evil trade? If at midnight a policeman finds a person on the streets, laden with burglar's tools hidden on his person, is he to permit him to go his way with his illegal burden? Is not the seizure of these instruments of crime a proper and reasonable thing for him to do? Would it not be conducive to the prevention of crime, to do that? Must the owner be allowed to retain them until it can be shown that he has already made an illegal use of them or intends so to use them? So, also, as to a slot machine, conceded in this case to be incapable of being used for legal purposes, it is a most effective manner of preventing its use to seize it as "outlawed" property. The duty to prevent crime carries with it in such a case the power to summarily seize the offending article. It would be anomalous to hold that the legislature in imposing on the policeman an obligation to prevent crime, intended to deny him one of the most effective means of performing such obligation. The power of the legislature to confer this authority under the police power cannot be questioned. If it can properly confer upon a milk inspector power to destroy milk summarily, as in Deem's Case, 80 Md. 173, 26 L. R. A. 541, 40 Atl. Rep. 648, it may for the same reason authorize the summary seizure and destruction of the tools and implements of crime. We have been cited to no case where these principles have been denied. Those relied upon by the appellee, some of which have already been adverted to, are not in conflict with them. Those are cases where the articles seized may be put to legal as well as illegal use, and, until it has been shown before the proper tribunal that it was designed to be put or has been put to an illegal use it cannot be seized as a preventive measure. But that is not the case at bar, because we here have it admitted, not only that the slot machine cannot be used for a legal purpose, but that the appellee intended to use it for illegal purposes. The subject has been learnedly and exhaustively discussed by Judge Redfield in the case of Spalding v. Preston, 21 Vt. 10, 50 Am. Dec. 68, in which the court sustained the view we have presented. That was an action of trover for certain counterfeit coin taken from a person who was afterwards indicted. The coin was claimed by a third person without however, accounting "for the unfortunate guise" in which it was presented. Redfield, J., delivering the opinion of the court, said: If trover, under these circumstances, can be maintained, then trespass would also lie for the taking of the property. Further, that the rights of the sheriff to seize rests upon grounds of preventive justice, aside of any statute whatever upon the subject; and that the right to detain the base metal might be rested on two grounds: (1) For evidence, and (2), because courts of justice will not sustain actions in regard to contracts or property which have for their object the violation of the law. Such property is "outlawed." And again, in State v. O'Neil, 58 Vt. 163, 56 Am. Rep. 556, 2 Atl. Rep. 586, where the court said "that articles or instrumentalities once impressed with the characteristics of adaptation and intended use for public peace, health, or morals, are subject to summary seizure under statutory, or even general, police regulations." In Bales v. State, 3 W. Va. 687, the court, while holding that poker chips might be the subject of larceny, said: "That they could not have been recovered by action is clear on the general principle that no court would lend its aid to the guilty keeper or owner to recover his illegal articles." This case is not cited as being approved in all respects by this court, but merely as sustaining the position that in a case like the present one the action of replevin will not lie. Eichenlaub v. St. Joseph, 113 Mo. 395, 18 L. R. A. 590, 21 S. W. Rep. 8.

Spiringfield, Ohio. WM. M. ROCKEL.

JETSAM AND FLOTSAM.

THE NEW STATE JURIST.

If men do according as they know at times, danger lies in what they think they know. Freed from the fetters of federal control, every avenue of thought in the new state is working over-time to display a well balanced level of local self-government.

The other day a farmer was carried before a magistrate of one of the Oklahoma counties, charged with trying to rearrange a neighbor's face with his hands without first obtaining consent. He entered a plea of not guilty and was required to furnish bail in the sum

of $250, for his appearance at the trial a few days later. Two of defendant's neighbors quite readily furnished the bail.

The magistrate was a prosperous farmer who believed much in preserving the dignity of the bench, much more perhaps than in due administration of justice with the necessary trimmings attached. On the day of trial the constable by a loud outcry announced the honorable court in session. Thinking, perhaps, he was unprepared for the enforcement of local self-government in that jurisdiction, the defendant did not appear. Thereupon the magistrate issued a bench warrant for the body of one of the bondsmen, against whom he cherished an old grudge, and commanded the constable to bring his body into court forthwith, dead or alive. After some hours of anxious waiting and several trips to the door to see if the trusted officer had performed his sworn duty, the constable arrived with the body of the much wanted and yet hated bondman, but fortunately in good shape. At once the culprit was commanded to rise and stand before the bar of his honor.

Magistrate—"You are guilty of violating the criminal laws of the sovereign state of Oklahoma by not having the defendant in court. Have you any reason to offer why the judgment of the court should not now be pronounced against you?"

Culprit—"But, your Honor, our bond answers for the appearance of the defendant."

Magistrate—"That was true while we were a territory and the 'fellers' at Washington run things down here, but I give you to know that you are now in the state of Oklahoma and we are running our own business, and in the judgment of this court the defendant was guilty of the crime charged, and he is hereby sentenced to pay a fine of $100 and the costs, and this bondman stands committed to the county jail until such fine and costs are paid."

Thereupon the bondman was committed to the vigilent care of the constable to see that he was placed in jail until the dignity of that court was respected by the citizens of its jurisdiction. At last report the bondman was hunting a lawyer to save him from the wrath of his first series of new state local self-government.

CORRESPONDENCE.

WHAT SHALL WE DO WITH HABITUAL CRIMINALS?

Editor of the Central Law Journal:

I have read with interest, in your issue of November 8th, 1907 (CENTRAL LAW JOURNAL, Vol. 65, page 357), the clipping from the National Corporation Reporter, discussing Attorney General Bonaparte's statement to the effect that habitual criminals should be executed.

The question, as to what should be done with those people, whose very purpose in living seems to be the commission of criminal acts, is of vital importance to society, and to every citizen as a member thereof.

The legislature of the state of Indiana (Acts of 1907, page 109), passed a habitual criminal act, which to the writer seems admirable in many respects, and which has embodied in it several features which the writer of the clipping above referred to, strongly advocated. The law is as follows: "That every person who, after having been twice convicted, sentenced and imprisoned in some penal institution for felony, whether committed heretofore or hereafter, and whether committed in this state or elsewhere, within the limits of the United States of America, shall be convicted in any circuit or criminal court in the state for a felony hereafter committed, shall be deemed and taken to be an habitual criminal, and he or she shall be sentenced to imprisonment in the state prison for and during his or her life." It is further provided that to authorize such a sentence, the indictment or affidavit shall allege that the defendant had been previously twice convicted and imprisoned for felonies, and the jury must so find in their verdict, along with the finding of guilt as to the third felony. The features spoken of, are, those of the length of the sentence given to habitual criminals, and the fact that all of the former offenses need not be committed in Indiana.

To the writer's mind the following provisions would add to the strenghth of an act of this character, where the title of the same is made broad enough to cover them.

First. That all criminals sentenced under an act of this character, should be confined in a separate part of the prison, or in a separate prison, and not allowed to commingle with other prisoners serving terms of shorter duration, and especially with those who were serving their first term. This would keep the prison from becoming a school of crime where those serving short terms could be educated by the habitual criminal, and then turned loose to prey upon society.

Second. That it should be made the duty of all wardens and keepers of the state prisons, to fully inform and instruct all prisoners, who are about to be discharged after serving sentences for felonies, as to the effect of a third conviction. If every convict, after having served a term in the states prison for the commission of a felony, knew that a third offense and conviction meant a life sentence, there would be fewer willing to take the chances of violating the laws for a third term.

But naturally the habitual criminal law has its enemies as well as its friends. I note through the public press, that Mr. Horace B. Hord, a New York lawyer and a native of the Hoosier state, at the annual meeting of the Daughters of Indiana, held in the city of New York a short time ago, said of the act above quoted that the same was "an outrage on civilization," and stated as a reason for his objection thereto that there was no need of such rigid legislation in this country, as "society is improving, rather than to the contrary."

Agreeing with the gentleman that society is improving, as I earnestly hope that it is, yet if society improves to such an extent that there are no further third convictions for felonies, then no one is injured by the existence of such a law, and if, on the contrary, society does not so improve, then we have a law capable of dealing with such criminals in such a way as will put an end to their depredations on society.

I should like to hear, through the JOURNAL, some other opinions upon this interesting and important question.

Very Respectfully,

Huntington, Ind. SUMNER KENNER.

HUMOR OF THE LAW.

The difficulties of an administration in Utah were recently demonstrated by the following questions propounded by the court to the perplexed legal representative of a deceased polygamist: "How many wives did your father have, Mr. Scott?" "You've got me there, Judge. I have found five, but I'm told he had two or three more." "How many children did he have?" "Well, I've rounded up sixty, your honor, but I believe there are some more scattered around the country."

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. ABATEMENT AND REVIVAL—Identity of Causes of Action.—*Lis pendens* cannot be pleaded on the ground of the co-existence of suits where the causes of action are not identical.—Central Improvement & Contracting Co. v. Grasser Contracting Co., La., 44 So. Rep. 10.

2. ACCIDENT INSURANCE—Employer's Liability Contracts.—A policy insuring an employer against loss from liability for injuries to employees held a contract of indemnity for the benefit of the assured, and that there was no right of action thereon against the insurance company until the assured sustained a loss by the payment of a liability.—Carter v. Ætna Life Ins. Co., Kan., 91 Pac. Rep. 178.

3. ACTION—Nature and Form.—A petition for damages against a railroad company, for injuries caused by an employee carelessly slamming the car door, held to state an action *ex delicto*.—Rushin v. Central of Georgia Ry. Co., Ga., 58 S. E. Rep. 357.

4. ANIMALS — Trespassing.—The owner of cattle of known roving and destructive tendencies must take commensurate precautions to prevent their escape to the lands of others.—Durkee v. Chino Land & Water Co., Cal., 91 Pac. Rep. 389.

5. APPEAL AND ERROR—Appeal Bond.—An appeal bond in a suit against the sheriff and police jury of a parish, though under its recitals not a bond of the police jury, held sufficient to support its appeal.—State v. Davis, La., 44 So. Rep. 4.

6. APPEAL AND ERROR—Conflicting Evidence.—The court of appeals, by the express terms of its creation, is without jurisdiction to consider an assignment of error addressed solely to a verdict on issuable facts.—Hastings & Co. v. Christopher, Ga., 58 S. E. Rep. 216.

7. APPEAL AND ERROR—Dismissal.—Where a litigant removes from a state to a federal court, and it is determined that the federal court has acted without jurisdiction, the rules limiting the time in which to appeal in the the court had run against him as if he had never prosecuted his remedy in another forum.—Mills v. American Bonding Co., Idaho, 91 Pac. Rep. 881.

8. APPEAL AND ERROR—New Trial.—Where the court properly sets aside a verdict for defendant for misconduct of the jury, and grants a new trial, the supreme court will not reverse such decision and direct judgment for the defendant on the merits.—Daub v. McCoy, Kan., 91 Pac. Rep. 91.

9. APPEAL AND ERROR—Time for Filing Transcript.—Time within which to file a transcript on appeal cannot be extended by stipulation without an order of the trial judge granted before the time allowed by law has expired pursuant to such stipulation.—Davidson v. Columbia Timber Co., Oreg., 91 Pac. Rep. 441.

10. APPEAL AND ERROR—Verdict.—Where the verdict is necessarily correct notwithstanding erroneous instructions, a new trial will not be granted.—Clark & Wilcox v. Empire Mercantile Co., Ga., 58 S. E. Rep. 363.

11. ARREST—Authority to Arrest Without Warrant.—No officer has authority without a warrant to arrest another and search his person to ascertain whether he is violating the law prohibiting carrying concealed weapons.—Hughes v. State, Ga., 58 S. E. Rep. 390.

12. ATTORNEY AND CLIENT—Attorney's Lien.—An attorney employed by the mother of illegimate child in prosecution in bastardy, under a contract to be paid an attorney's fee out of the fund recovered, has a lien upon such fund for his fees.—Costigan v. Stewart, Kan., 91 Pac. Rep. 88.

13. ATTORNEY AND CLIENT—Disbarment Proceedings.—In disbarment proceedings, security for costs could be required from the Alabama State Bar Association under Gen. Act 1903, p. 846, only on motion of the solicitor.—Johnson v. State, Ala., 44 So. Rep. 671.

14. BAILMENT—Conversion by Bailee.—Where a check is deposited in aid of a bond, the transaction is a bailment, and the application of a check to any other purpose held a conversion on the part of the bailee.—Haines v. Chappell, Ga., 58 S. E. Rep. 220.

15. BANKRUPTCY—Action by Trustee.—In order for a trustee in bankruptcy to maintain a suit to set aside as fraudulent a conveyance by the bankrupt, he must show by the record of the referee in bankruptcy that he has followed the procedure pointed out by the bankrupt act, and that the claims on which he bases his action have been ascertained and established.—Leavengood v. McGee, Oreg., 91 Pac. Rep. 453.

16. BANKRUPTCY—Discharge.—Where a contractor is discharged in bankruptcy prior to a judgment creating a lien for material furnished, the lien cannot thereafter be foreclosed against the property of the owner.—Philip Carey Mfg. Co. v. Viaduct Place, Ga., 58 S. E. Rep. 274.

17. BANKRUPTCY — Summary Proceedings.—Where a receiver for a bankrupt's estate has with the assent of the bankruptcy court, vacated premises of which a third party was claiming the right of possession, and such third person has thereupon made peaceable entry thereon, a subsequently appointed trustee of the estate cannot oust the third party and retake possession through a summary proceeding in the court of bankruptcy.—*In re* Rothschild, U. S. C. C. of App., Second Circuit, 154 Fed. Rep. 194.

18. BANKRUPTCY—Time for Proving Claims.—A creditor, who at the time of the bankruptcy of his debtor has an attachment suit pending, through which, if successful, he will realize his debt, is not required to prove his claim in bankruptcy until the termination of such suit, when, if defeated, he may prove the same, although more than a year has elapsed since the adjudication, as a claim liquidated by litigation.—*In re* Baird, U. S. D. C., E. D. Pa., 154 Fed. Rep. 215.

19. BANKS AND BANKING—Payment of Forged Checks.—A bank which pays forged checks drawn on it to another bank may recover from such other bank the amount so paid, if the same be demanded before that bank has been placed in any worse position than it would have been, had the drawee refused payment when the checks were presented to it.—Canadian Bank of Commerce v. Bingham, Wash., 91 Pac. Rep. 185.

20. BENEFIT SOCIETIES — By-Laws.—A member of a mutual benefit society held bound by a by-law in force when he joined, and made a part of his contract with his knowledge.—Donnelly v. Supreme Council Catholic Benev. Legion, Md., 67 Atl. Rep. 276.

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21. BENEFIT SOCIETIES—Statements of Attending Physician.—Statements of attending physician beyond those necessary to establish death on information obtained in a professional way held not admissions of the beneficiary made in connection with his proof of death.—Triple Tie Benefit Ass'n v. Wheatley, Kan., 91 Pac. Rep. 59.

22. BIGAMY—Question for Jury.—In a prosecution for bigamy, whether there was a common-law marriage in the state between defendant and one who had formerly been his wife held, under the evidence, a question for the jury.—Williams v. State, Ala., 44 So. Rep. 57.

23. BILLS AND NOTES — Accommodation Paper.—A party to a note, who has himself received no value, may nevertheless become liable to a holder for value; the holder having incurred a detriment on the faith of such party's name.—Polhemus v. Prudential Realty Corp, N. J., 67 Atl. Rep. 303.

24. BILLS AND NOTES—Delay in Presenting Check.—To hold the payee of a check liable for failure to present it on the bank's failure, the maker of the check must have had in the bank funds subject to the payment thereof, or agreement with the bank that it would be paid.—Lester-Whitney Shoe Co. v. Oliver Co., Ga., 58 S. E. Rep. 212.

25. BILLS AND NOTES—Indorsement.—A seal is unnecessary to the indorsement of a negotiable instrument, whether the indorsement be that of a private person or of a corporation.—Sheffield v. Johnson County Sav. Bank, Ga., 58 S. E. Rep. 386.

26. BROKERS—Commissions.—A real estate agent who merely procured another to look at property with a view to buying it held not entitled to a commission on a subsequent sale of the property by the owner to such other.—Sharpley v. Lee Moody & Co., Ala., 44 So. Rep. 650.

27. CARRIERS—Contract for Transportation.—A contract for carriage of goods need not be in writing, but may be implied from delivery and acceptance of the goods for shipment, and the consignor may sue for the loss or nondelivery, though he be but a bailee.—Southern Ry. Co. v. Johnson, Ga., 58 S. E. Rep 333.

28. CARRIERS—Joint Rate.—A "joint rate," as authorized by Civ. Code 1895, § 2189, may be made by deducting some prescribed per cent. from each of the local rates and adding together the two rates thus reduced but such method is not exclusive.—Hill v. Wadley Southern Ry. Co., Ga., 57 S. E. Rep. 795.

29. CARRIERS—Joint Tort Feasors.—One having a right to recover against either of two joint wrongdoers or both cannot, in an action against both, be involved in litigation to determine the question of the respective rights of the wrongdoers as against each other.—Cordiner v. Los Angeles Traction Co., Cal., 91 Pac. Rep. 486.

30. CARRIERS—Waiting Room.—If the condition of a carrier's waiting room was the proximate cause of a passenger contracting pneumonia, the carrier is liable in damages.—St. Louis, I. M. & S. R. Co. v. Hook, Ark., 104 S. W. Rep. 217.

31. CHATTEL MORTGAGES — Construction.—Where a contract for the sale of a sawmill edger reserved a mortgage lien providing that the price should not be due until a certain number of logs had been delivered, the buyer was entitled to possession up to the delivery of the last lot of logs.—Hardison v. Plummer, Ala., 44 So. Rep. 591.

32. CHATTEL MORTGAGES — Priorities.—The lien of a prior valid recorded mortgage will take precedence over subsequently acquired lien of a livery stable keeper on animals placed in his charge, unless delivered with the consent of the mortgagee.—National Bank of Commerce v. Jones, Okla., 91 Pac. Rep. 191.

33. COMMERCE—Intoxicating Liquors.—Delivery of an interstate shipment of liquors to the consignees held essential to constitute their arrival within Act Cong. August 8, 1890, ch. 728, 26 Stat. 313 [U. S. Comp. St. 1901, p. 3177], so as to make them subject to the laws thereof.—State v. Intoxicating Liquors, Me., 67 Atl. Rep. 312.

34. COMMERCE—Police Power of State.—Acts 1904, p. 106, No. 48, forbidding the sale of the plumage, skin, or body of any nongame bird protected by the act, whether the bird was captured or killed within or without the state, is not in violation of interstate commerce.—*In re* Schwartz, La., 44 So. Rep. 20.

35. CONSTITUTIONAL LAW—Constitutional Convention.—Equity has no jurirdiction to enjoin the constitutional convention, or its officers or delegates, from exercising any of the powers given to it by congress or the people; nor can it restrain the submission of the constitution to the people in advance of its adoption and ratification by the people and its approval by the president as unconstitutional.—Walck v. Murray, Okla., 91 Pac. Rep. 239.

36. CONSTITUTIONAL LAW—Curative Statutes.—In the absence of constitutional restrictions, the power of the legislature to validate past transactions which it could have authorized in advance is restrained only by the necessity of protecting vested rights.—City of Redlands v. Brook, Cal., 91 Pac. Rep. 150.

37. CONSTITUTIONAL LAW—Punitive Damages.—Acts Feb. 20, 1899 (Gen. Acts 1898-99, p. 32), amending Code 1896, § 1441, held not to contravene Bill of Rights, § 13, guaranteeing every person a remedy for any injury done him, by denying the right, under certain conditions, to punitive damages for libel.—Comer v. Age Herald Pub. Co., Ala., 44 So. Rep. 673.

38. CONTEMPT—Misconduct of Attorney.—An attorney who knowingly presents on behalf of his client an affidavit containing averments attacking the integrity of the judge and containing defamatory matter is guilty of contempt.—Lamberson v. Superior Court of Tulare County, Cal., 91 Pac. Rep. 100.

39. CONTRACTS—Construction.—Where a stock of goods had been twice sold by invoice, and it was an issue of fact as to which invoice was to determine the cost or value, the meaning of the words "invoice cost" in the contract was for the jury.—Clark & Wilcox v. Empire Mercantile Co., Ga., 58 S. E. Rep. 363.

40. CONTRACTS — Construction Against Party Using Words.—Where the true import and meaning of a written instrument is doubtful, it should be construed most strongly against the person using the doubtful language.—Loomis v. MacFarlane, Oreg., 91 Pac. Rep. 466.

41. CONTRACTS—Modification. — Though parties may by a course of dealing under a contract waive a stipulation therein, yet, it must first appear that it was the mutual intention of the parties to so change the contract.—Bearden Mercantile Co. v. Madison Oil Co., Ga., 58 S. E. Rep. 200

42. CONTRACTS—Requisites and Validity.—Since an offer to form the basis of a legal obligation must be so complete that, on acceptance, an agreement is formed which contains all the terms necessary to determine whether the contract has been performed or not, there is no contract where the price is not determined.—Butler v. Kemmerer, Pa., 67 Atl. Rep. 332.

43. CONTRACTS—Waiver.—Where a contractor promised to finish work abandoned because of substantial and unforeseen difficulties upon the promise of the owner to pay him an additional compensation, the parties held to have waived the original contract and to have substituted the new one for it.—Linz v. Schuck, Md., 67 Atl. Rep. 286.

44. CORPORATIONS—Actions.—Where, in an action on a note by a corporation, defendant admits the execution of the note, such admission, with the presumption of corporate existence, makes a *prima facie* case for plaintiff entitling defendant to open and close.—E. Van Winkle Gin & Machine Works v. Mathews, Ga., 58 S. E. Rep. 396.

45. CORPORATIONS—Negotiable Instruments.—A seal is unnecessary to the indorsement of a negotiable instrument, whether the indorsement be that of a private person or of a corporation.—Sheffield v. Johnson County Sav. Bank, Ga., 58 S. E. Rep. 386.

46 CORPORATIONS—Right to Assess Stock.—The power of a corporation to levy an assessment on full-paid capital stock must be derived from the statute, the articles of incorporation, or some other express promise to pay.—Nelson v. Keith-O'Brien Co., Utah, 91 Pac. Rep. 80.

47. CORPORATIONS—Stock Subscriptions.—Purchase of stockholders' subscription liabilities by a corporation with its assets held fraudulent and void as to both existing and subsequent creditors; the latter being without notice of the transaction at the time their claims were contracted.—Alabama Terminal & Improvement Co. v. Hall, Ala., 44 So. Rep. 592.

48. CORPORATIONS—What Constitutes Doing Business in Foreign State.—A foreign corporation held doing business in the state where the securing of orders for scholarships and payments in advance were done through an agent in the state.—International Text-Book Co. v. Pigg, Kan., 91 Pac. Rep. 74.

49. COUNTIES—Action by Taxpayers.—It would be inequitable to allow taxpayers who had knowledge of a contract by county commissioners, and who stood silent until a greater part of the work was done, to enjoin the county commissioners from paying for the work because of irregularities in the letting of the contract and a defective exercise of authority conferred on the board.—Meistrell v. Board of Comrs. of Ellis County, Kan., 91 Pac. Rep. 65.

50. COUNTIES — Officers. — A county is not liable to its treasurer for commissions on a fund which he never handled and which was raised by private donation and deposited with the ordinary to buy a lot and erect a public building for the county.—Worth County v. Sykes, Ga., 58 S. E. Rep. 380

51. COURTS—Pleadings.—Personal appearance by defendant at the place of holding court on answer day is not a legal step in a civil action in the court of Coffeyville, but he should file some written pleading under the Code.—Shockman v. Williams, Kan., 91 Pac. Rep. 64.

52. CRIMINAL EVIDENCE—Illegal Sale of Liquor.—In a prosecution for selling liquor illegally, evidence that witness went into his "place of business" and that there was a man behind the bar, held to refer to defendant's place of business, and was not objectionable for irrelevancy.—Lambie v. State, Ala., 44 So. Rep. 51.

53. CRIMINAL EVIDENCE—Search of Defendant's Person.—The burden is on the state to show that evidence obtained by search of defendant's person was procured after a legal arrest.—Sherman v. State, Ga., 58 S. E. Rep. 393.

54. CRIMINAL TRIAL—Accused as Witness. — Though accused is a competent witness in his own behalf, in considering his testimony, the jury may weigh it in the light of the interest he has in the verdict, together with all the other testimony in the case.—Davis v. State, Ala., 44 So. Rep. 561.

55. CRIMINAL TRIAL—Defendant's Statements. — The trial judge in stating the contentions of a party should not so mingle such contentions with the deductions favorable to such party as to present such contentions to the jury in the form of an argument.—Rouse v. State, Ga., 58 S. E. Rep. 416.

56. CRIMINAL TRIAL—Illegal Sale of Intoxicants.—Proof of sale of "beer" held enough on prosecution for illegal sale of intoxicating liquor.—State v. Carmody, Oreg., 91 Pac. Rep. 446.

57. CRIMINAL TRIAL—Misdemeanors.—Pen. Code 1895, § 1039, prescribing a definite punishment for every crime declared to be a misdemeanor, is not confined to misdemeanors enumerated in the Code, but has a prospective force.—Anderson v. State, Ga., 58 S. E. Rep. 401.

58. CRIMINAL TRIAL—Plea in Abatement.—Where defendant's pleas in abatement and not guilty were tried to a jury at the same time, a general verdict of "guilty as charged" held not responsive to the plea in abatement.—Tucker v. State, Ala., 44 So. Rep. 587.

59. CRIMINAL TRIAL—Prosecution for Murder.—In a prosecution for murder, a witness who was familiar with the hoof beat of one of decedent's horses held competent to give his opinion that he recognized the hoof beat of such horse being driven across a bridge early in the evening on the day deceased was killed.—Holder v. State, Tenn., 104 S. W. Rep. 225.

60. CRIMINAL TRIAL—Time for Deliberation.—It is largely in the discretion of the trial court to determine the length of time a jury should deliberate.—State v. Harris, La., 44 So. Rep. 22.

61. DAMAGES—Injury to Health.—In an action against a railway company for maintaining a waiting room in such condition that plaintiff, while waiting for a delayed train, contracted pneumonia, held proper to authorize recovery for any diminution of his health and vigor occasioned by the alleged wrong.—St. Louis, I. M. & S. R. Co. v. Hook, Ark., 104 S. W. Rep. 217.

62. DAMAGES—Personal Injuries.—In a personal injury action, it was not error to admit the American Tables of Mortality, in view of the issue whether the injury would be temporary or permanent.—Southern Ry. Co. v. Cunningham, Ala., 44 So. Rep. 658.

63. DEEDS—Construction.—A deed by husband to wife of a life estate held not to vest an estate in their child as purchaser, in case of the death of the husband before the wife, so as to prevent their conveying a fee simple.—Due v. Woodward, Ala., 44 So. Rep. 44.

64. DEEDS—Undue Influence.—Mortgagor, in the absence of a showing of the fairness of the transaction and his capacity to make a deed of the mortgaged premises executed by him to the mortgagee, held entitled to have same canceled.—Leech v. Hirshman, Miss., 44 So. Rep. 33.

65. DEDICATION—Acts Constituting.—Where a deed to the judges of the inferior court of a county declared that a part therein described should remain as a common for a town named, that the town had not then been incorporated, did not destroy the effectiveness of the dedication.—County of Gordon v. Town of Calhoun, Ga., 58 S. E. Rep. 360.

66. DESCENT AND DISTRIBUTION — Surviving Wife.—Where a widow, entitled to either dower or a child's part in the real estate of her husband, dealt with an interest therein as if she were the absolute owner, held to raise the inference that she had elected to take a child's part.—Rountree v. Gaulden, Ga., 58 S. E. Rep. 346.

67. DIVORCE—Cross-Petition.—Where a husband sued his wife for divorce, and she filed cross-petition, praying for alimony and injunction, in so far as it prayed for extraordinary equitable relief it would be stricken if not verified. — McLaughlin v. McLaughlin, Ga., 58 S. E. Rep. 156.

68. DIVORCE—Custody of Child.—Wife's past immoral character held not to establish her unfitness to have the custody of her minor child on divorce.—Curtis v. Curtis, Wash., 91 Pac. Rep. 188.

69. DOMICILE—Right of Husband to Select.—A husband is entitled to select the home; and it is the duty of the wife to go to him at his request on his furnishing the means.—Codoni v. Donati, Cal., 91 Pac. Rep. 423.

70. DRUNKARDS—Intoxication on Highway.—The term "public highway" as used in the statute prohibiting drunkenness thereon, is not synonymous with the term "public road."—Johnson v. State, Ga., 58 S. E. Rep. 265.

71. EASEMENTS—Extinguishment.—Though mere nonuser of an easement, even for more than 20 years, will not accord conclusive evidence of abandonment, such nonuser for a prescriptive period, united with an adverse use of the servient estate inconsistent with the existence of the easement, will extinguish it.—Canton Co. of Baltimore v. City of Baltimore, Md., 67 Atl. Rep. 274.

72. ELECTIONS—Acceptance of Certificate for Filing.—Where a certificate of party nominations was presented to the registrar of voters after the hour prescribed by law for closing his office, but before it was closed, it was his duty to receive and file it.—Cosgriff v. Board of Election Com'rs of City and County of San Francisco, Cal., 91 Pac. Rep. 98.

73. EMBEZZLEMENT—Presumption of Fraudulent Intent.—The principle that, if one received money for a certain purpose and afterwards refused to return it,

fraudulent intent at the time of taking will be presumed, cannot be applied to embezzlement, since that would make the offense larceny.—Knight v. State, Ala., 44 So. Rep. 585.

74. ESTOPPEL—By Deed.—A state holding land under a valid deed from S. by securing a deed to the same land from the heirs of S. held not estopped from asserting that it holds the land under a different tenure than that expressed in the second deed.—Sylvester v. State, Wash., 91 Pac. Rep. 15.

75. EVIDENCE—Harmless Admission.—Errors in admitting or rejecting evidence on the merits are without prejudice to the party against whom made, where it is established that the action is barred by the statute of limitations.—Visher v Wilbur, Cal., 91 Pac. Rep. 412.

76. EVIDENCE—Hypothetical Questions.—A hypothetical question asked a physician as an expert witness was not objectionable because not embodying other proven facts than those therein mentioned on the point covered by the question.—St. Louis, I. M. & S. R. Co. v. Hook, Ark., 104 S.W. Rep. 217.

77. EVIDENCE—Offer to Compromise.—An offer to compromise is inadmissible in evidence; but an independent admission of a fact, such as the handwriting of a party, or that a certain item of an account was correct, is admissible.—Whitney v. Cleveland, Idaho, 91 Pac. Rep. 176.

79. EVIDENCE—Opinion Evidence.—An oil producer and driller of oil wells, who has explored and examined lands, may testify as to whether in his opinion the lands are profitable or unprofitable territory.—Crosby v. Wells, N. J., 67 Atl. Rep. 295.

79. EVIDENCE—Value of Dog.—The value of a dog maliciously killed or injured may be proved by evidence of his breed and qualities, and by witnesses who knew the market value of such animal.—Columbus R. Co. v. Woolfolk, Ga., 58 S. E. Rep. 152.

80. EXECUTORS AND ADMINISTRATORS—Accounting.—An administrator who satisfies a mortgage debt on land of the estate out of the proceeds of a sale thereof had under order of the probate court, without taking an assignment of the mortgage, is not entitled to credit for such payment.—Denman v. Payne, Ala., 44 So. Rep. 635.

81. EXECUTORS AND ADMINISTRATORS—Collateral Attack.—A probate decree appointing an administrator held not subject to collateral attack in a suit by the administrator for decedent's wrongful death, because the decree was not entered before the suit was brought.—Louisville & N. R. Co. v. Perkins, Ala., 44 So. Rep. 602.

82. EXECUTORS AND ADMINISTRATORS — Disputed Claims.—Where a claim was filed by the heirs at law of H., deceased, against the estate of E. showing an indebtedness by E. to H., it was error for the court to exclude it on the ground that it was not legally filed by a person authorized under the law to do so.—Hunt v. Curtis, Ala., 44 So. Rep. 54.

83. EXECUTORS AND ADMINISTRATORS—Presumptions.—After 20 years from the qualification of a legal representative, it is a legitimate presumption that the estate has been duly administered, and the burden is on the legal representative seeking to assert a right of the estate to certain property to show facts sufficient to remove the presumption.—Hodges v. Stuart Lumber Co., Ga., 58 S. E. Rep. 854.

84. EXEMPTIONS—Tools and Implements.—A traction engine and the appliances commonly used in connection therewith are tools and implements exempt to an owner who is a resident of the state and the head of a family under Gen. St. 1901, § 3018, subd. 8.—Reeves & Co. v. Bascue, Kan., 91 Pac. Rep. 77.

85. FRAUD—Misrepresentations.—False representation may be made by presenting that which is true so as to create an impression which is false, and then profiting by the false impression thus created.—Tolley v. Poteet, W. Va., 57 S. E. Rep. 811.

86. GAME—Protection of Non-Game Birds.—Acts 1904, p. 106, No. 49, forbidding any person to have in his or their possession any resident or migratory non-game bird or expose them for sale, except as provided by the act, is not unconstitutional.—*In re* Schwartz, La., 44 So. Rep. 20.

87. GAMING—Dealing in Futures.—Boykin Act (Acts 1906, p. 95) withdraws from the business of dealing in futures on margins whatever legislative sanction there was to be implied from the fact that by the tax act of the state a license tax had been imposed on "bucket shops."—Anderson v. State, Ga., 58 S. E. Rep. 401.

88. GARNISHMENT—Judgment.—A valid existing judgment against defendant is a condition precedent to a judgment against a garnishee, and garnishee may contest the validity of the judgment against defendant.—Ingram v. Jackson Mercantile Co., Ga., 58 S. E. Rep. 372.

89. GARNISHMENT—Property Subject.—Where a fund in the hands of a garnishee is to be advanced under a contract, and held for one special purpose only, the garnishing creditor cannot extend his rights beyond those of the defendant.—Holmes & Co. v. Pope & Fleming, Ga., 58 S. E. Rep. 281.

90. GUARANTY—Conditions Precedent.—The condition of a guaranty that the earnings from the management of a log boom shall amount to a sum specified, provided that guarantee should conduct the same in a faithful, business, and workmanlike manner, held complied with by guarantee.—Loomis v. MacFarlane, Oreg., 91 Pac. Rep. 466.

91. GUARANTY—Limitation of Liability.—Guarantors may bind themselves in different amounts for the same debt, and, as long as the debt guaranteed remains unpaid, each is liable to the extent of this promise, at least for the unpaid balance.—Lefkovits v. First Nat. Bank, Ala., 44 So. Rep. 613.

92. HEALTH—Fertilizers.—Where the board of health passed an ordinance declaring the use of fish and shrimp shell refuse as a fertilizer to be a nuisance, the question whether such fertilizers can be safely used during the winter months is concluded by the ordinance.—Nacarri v. Rappelet, La., 44 So. Rep. 18.

93. HIGHWAYS — Establishment by User.—If a highway has been traveled, used, improved, and worked by the public as a county road for a period of 10 years or more, it is a legal county road.—Ridings v. Marion County, Oreg., 91 Pac. Rep. 22.

94. HOMICIDE—Conspiracy.—Defendant, having conspired to kill deceased, held equally guilty whether he was present or not at the time and place the crime was committed.—Rigsby v. State, Ala., 44 So. Rep. 608.

95. HOMICIDE—Evidence.—Where, on a trial for murder, self-defense is pleaded, threats by decedent to kill defendant the first time he saw him, made within an hour of the shooting, are admissible, though they were uncommunicated to defendant, on the issue of who was the aggressor.—State v. Jackman, Nev., 91 Pac. Rep. 143.

96. HUSBAND AND WIFE—Law of Domicile.—Where a married woman is authorized to contract as a *feme sole* in her domicile and to sue and be sued, her status accompanies her to this state, unless controlled by considerations of public policy.—Freret v. Taylor, La., 44 So. Rep. 26.

97. HUSBAND AND WIFE—Liability of Husband for Supplies.—The statute authorizing married women to contract does not abrogate the common-law liability of the husband for necessary comforts and supplies furnished the wife suitable to their condition and degree in life.—Ponder v. D. W. Morris & Bro., Ala., 44 So. Rep. 651.

98. HUSBAND AND WIFE—Mortgages.—A wife joining her husband in a mortgage of his property, used as the family homestead, to secure their joint note, the consideration of which was received by him alone, held to have no right of redemption, so that her deed gave none.—Robbins v. Brown, Ala., 44 So. Rep. 63.

99. INDICTMENT AND INFORMATION—Failure to Sign.—Failure of foreman of grand jury to subscribe his name

to the fact that an indictment was a true bill held ground for quashing it.—Coburn v. State, Ala., 44 So. Rep. 58.

100. INDICTMENT AND INFORMATION—Matters to be Proved.—The name "Americus Furniture & Undertaking Company" implies a corporation, and an allegation in a criminal accusation that the company is a corporation need not be proved.—Ager v. State, Ga., 58 S. E. Rep. 874.

101. INDICTMENT AND INFORMATION — Variance from Commitment.—A variance between the commitment and the information, relating to the particular date of the commission of the crime, is unimportant when it appears that only one offense was committed.—People v. Bianchino, Cal., 91 Pac. Rep. 112.

102. INJUNCTION — Unconscionable Action at Law.—Grantors in a trust deed given to secure payment of a note held not entitled to plead the statute of limitations to the note and secure the property on the ground that a substitution of trustees was irregular.—Wall v. Harris, Miss., 44 So. Rep. 36.

103. INTOXICATING LIQUORS—Hop Jack.—The sale of "hop jack" or "hop ale" made from malt held a violation of Acts 1892-93, pp. 15, 16, whether intoxicating or not.—Lambie v. State, Ala., 44 So. Rep. 51.

104. INTOXICATING LIQUORS—What Constitutes Sale.—An agent of an express company, who delivered an interstate shipment of liquor to consignee in the usual course of business of the carrier and collected from consignee the price of the liquor and cost of carriage, held not guilty of selling intoxicating liquor without a state license, though he knew that the consignee had not ordered the liquor.—State v. Kenney, W. Va., 57 S. E. Rep. 823.

105. JUDGMENT—Equitable Relief.—Where plaintiff executed a usurious note containing a power of attorney to confess judgment, he was entitled to maintain a bill to set aside a judgment entered under the power in order to purge the transaction of usury.—Hightower v. Coalson, Ala., 44 So. Rep. 53.

106. JUDGMENT—Res Judicata.—Where by decree land of one devisee is on his death intestate partitioned to his heirs, another devisee cannot thereafter assert against his co-partitioners any greater interest in the land partitioned than that conferred upon him thereby.—Tolley v. Poteet, W. Va., 57 S. E. Rep. 811.

107. JUDGMENT — Vacating Judgment.—Where, after counsel reprsenting the respective parties agreed that the cause might be continued, other counsel for one of the parties procured the suit to be dismissed for want of prosecution, such judgment will be set aside and a new trial granted.—Logan v. Anderson County Telephone Co., Ky., 104 S. W. Rep. 256.

108. LANDLORD AND TENANT—Breach of Lease.—The measure of damages for breach by lessor of a lease of a farm for one year is the difference between the rent to be paid and the rental value.—Palmer v. Ingram, Ga., 58 S. E. Rep. 862.

109. LIBEL AND SLANDER—Privileged Communications.—Communications held privileged if made in good faith by one in the prosecution of an inquiry regarding a crime.—Taylor v. Chambers, Ga., 58 S. E. Rep. 869.

110. LIBEL AND SLANDER — Words Spoken to Person Slandered.—Words spoken to another, in the presence and hearing of third persons, charging her with false swearing, are none the less actionable because spoken to her, and not to such third persons.—Moore v. Dodd, Ky., 104 S. W. Rep. 224.

111. LIMITATION OF ACTIONS — Acknowledgment of Debt.—A declaration in writing cannot revive a barred cause of action, unless it contains an express promise to pay the debt or an acknowledgment from which the promise may be implied.—Visher v. Wilbur, Cal., 91 Pac. Rep. 412.

112. MANDAMUS—Matters of Discretion.—The power of a court to compel the Attorney-General to grant leave to commence a suit against his conscientious belief that such leave should not be given should be exercised only where the abuse of discretion in refusing leave is extreme and clearly indefensible.—Lamb v. Webb, Cal., 91 Pac. Rep. 102.

113. MARRIAGE — Annulment.—Pierce's Code, § 885, subd. 4 (Ballinger's Ann. Codes & St. § 4877), authorizing service of summons by publication on a nonresident defendant in an action for divorce, authorizes like service in an action for the annulment of a marriage.—Piper v. Piper, Wash., 91 Pac. Rep. 189.

114. MASTER AND SERVANT—Assumed Risk.—A servant may excuse his master from guarding dangerous machinery if the servant consents to work at a place where he will be exposed to danger from such machinery with full knowledge of the risk incurred.—Westman v. Wind River Lumber Co., Oreg., 91 Pac. Rep. 478.

115. MASTER AND SERVANT—Dangerous Machinery.—Where plaintiff, an inexperienced minor, was employed as an oiler in defendant's sawmill, defendant was bound to warn him of the dangers of the service, unless they were open and apparent to a person in the exercise of ordinary care of plaintiff's capacity.—Westman v. Wind River Lumber Co., Oreg., 91 Pac. Rep. 478.

116. MASTER AND SERVANT—What Law Governs.—A servant cannot recover in Alabama for injuries to his person sustained by the alleged negligence of his master in Florida, unless he had a right of action under the laws of Florida.—Watford v. Alabama & Florida Lumber Co., Ala., 44 So. Rep. 567.

117. MASTER AND SERVANT—What Risks Assumed.—An employee in assuming the ordinary risks of an employment by entering or remaining therein does not assume the risk of an independent danger produced by the negligence of the master, or, in case of railroad companies, by the negligence of a fellow servant.—Atlanta & B. A. L. Ry. v. McManus, Ga., 58 S. E. Rep. 258.

118. MASTER AND SERVANT—What Risks Assumed.—The assumption of the known ordinary risks of a dangerous employment does not carry with it the assumption of an extraordinary hazard occasioned by the master's negligence.—Southern Cotton-Oil Co. v. Gladman, Ga., 58 S. E. Rep. 249.

119. MUNICIPAL CORPORATIONS — Police Powers.—A city whose charter contains a general welfare clause may legally pass an ordinance prohibiting the possession of liquors for illegal sale.—Sawyer v. City of Blakely, Ga., 58 S. E. Rep. 399.

120. MUNICIPAL CORPORATIONS—Removal of Civil Service Employee.—Where plaintiff a veteran civil service employee, was illegally removed without a hearing, it was no answer to his claim for salary that he was only entitled to nominal damages because his misconduct would have rendered removal inevitable if he had been afforded a hearing.—Ransom v. City of Boston, Mass., 81 N. E. Rep. 998.

121. NEGLIGENCE—Duty to Avoid Another's Negligence.—Duty to exercise ordinary care to avoid another's negligence does not arise until the danger is impending or an ordinarily prudent man would have reason to apprehend its existence.—Western & A. R. Co. v. York, Ga., 58 S. E. Rep. 183.

122. NUISANCE—Obstruction of Drain.—A railroad company is liable for damages arising from nuisance caused by its roadbed obstructing a drain, notwithstanding its roadbed may have been constructed on scientific principles, which, though producing a temporary nuisance, would eventually destroy the same.—Georgia, F. & A. Ry. Co. v. Jernigan, Ga., 57 S. E. Rep. 791.

123. PARTNERSHIP — Conversion of Real Estate into Personalty.—The doctrine of the conversion of partnership real estate into personalty does not change the tenure by which the land is held nor effect the conveyance of such real estate for other purposes than for the payment of firm debts.—Butts v. Cooper, Ala., 44 So. Rep. 616.

124. PARTNERSHIP—Dissolution.—No personal decree should be rendered in partnership dissolution proceedings against individual partners until the assets have been converted into money.—Stower v. Kamphefner Cal., 91 Pac. Rep. 424.

125. PARTNERSHIP—Rights of Partners.—A partner can not charge his copartners with any sum for compensation on account of services in conducting the partner ship business, in the absence of an agreement to that effect.—Peck v. Alexander, Colo., 91 Pac. Rep. 88.

126. PLEDGES—Commercial Paper.—A creditor holding commercial paper as a pledge or collateral security may bring either an action to enforce the principal debt or to collect the pledged paper.—Polhemus v. Prudential Realty Corp., N. J., 67 Atl. Rep. 303.

127. PRINCIPAL AND AGENT—Powers of Agent.—Where an agent authorized to sell a horse in his possession belonging to his principal transferred the horse to B. upon the consideration of B.'s surrender of a note against the agent, the sale passed no title as against the principal.—Grubel v. Busche, Kan., 91 Pac. Rep. 73.

128. RAILROADS—Blowing Whistle.—The act of an engineer in blowing the whistle at a crossing or to prevent stock from getting on the track held not negligence unless the whistle was blown in an unnecessary and unusual manner.—Southern Ry. Co. v. Puryear, Ga., 58 S. E. Rep. 306.

129. RAILROADS—Cattle Guards.—A railroad company is under no duty to construct and maintain a stock gap to prevent stock from going on its track or within the inclosure formed by the fencing of its right of way.—St. Louis & S. F. R. Co. v. Douglas, Ala., 44 So. Rep. 677.

130. RAILROADS—Expulsion of Passenger.—Conductor held to have no legal right to put passenger off because he refused to pay four cents per mile, the charge imposed on those who ride without tickets.—Brown v. Central of Georgia Ry. Co., Ga., 58 S. E. Rep. 163.

131. RAILROADS — Fires Set by Engine.—A railway company must exercise reasonable care to keep its right of way at points adjoining the private property of others free from combustible materials liable to become ignited from passing trains.—Fireman's Fund Ins. Co. v. Northern Pac. R. Co., Wash., 91 Pac. Rep. 13.

132. REPLEVIN—Failure to Assert Title.—Where plaintiff did not know of a sale of a horse by his agent to defendant until a long time after the sale, held that his acts after learning of the sale could not estop him from asserting his title to the horse.—Grubel v. Busche, Kan., 91 Pac. Rep. 73.

133 SALES—Authority of Agent.—In an action to recover the purchase price of a machine sold defendant by plaintiff, evidence held to warrant an inference that plaintiff's general agent had authority to contract for delivery of the machine at a certain place.—McCormick Harvesting Mach. Co. v. Lowe, Ala., 44 So. Rep. 47.

134. SALES—Conditional Offer to Purchase.—Where a traveling salesman takes a written contract to buy an article on named conditions, subject to the approval of his principal, the writing is unilateral until the approval has been duly made.—Cable Co. v. Hancock, Ga., 58 S. E. Rep. 319.

135. SALES—Latent Defects.—Where a dealer contracts to deliver at an agreed price a specified article generally manufactured, there is no implied warranty against latent defects of which the dealer has no knowledge.—Ehrsam v. Brown, Kan., 91 Pac. Rep. 179.

136. SALES Passing of Title.—Where personal chattels are sold on condition that they are to be paid for on delivery, and payment is refused on demand, no title passes.—Starnes v. Roberts, Ga., 58 S. E. Rep. 348.

137. SCHOOLS AND SCHOOL DISTRICTS—Contract with Teacher.—Where public school trustees in their individual capacity agree with one to employ him as a teacher, and as a board repudiate the agreement, such person is without redress, since the agreement was against public policy.—McGinn v. Willey, Cal., 91 Pac. Rep. 423.

138. SCHOOLS AND SCHOOL DISTRICTS—Exclusion of Colored Children.—In the absence of statutory authority the board of education of the city of Wichita has no right to exclude a child by reason of its color from any public school.—Rowles v. Board of Education of City of Wichita, Kan., 91 Pac. Rep. 88.

139. SEARCHES AND SEIZURES—Unreasonable Searches.—An arrest without warrant and search of the person to ascertain whether he is violating the law prohibiting carrying concealed weapons is unreasonable within the constitution —Hughes v. State, Ga., 58 S. E. Rep. 390.

140. SHERIFFS AND CONSTABLES—Wrongful Levy.—In trover for property levied on by a constable under a void execution, the constable held entitled to prove a levy under a valid second execution and to show title thereunder in the judgment debtor.—Pruitt v. Gunn, Ala., 44 So. Rep. 569.

141. STATUTE OF FRAUDS—Contracts Pertaining to Land.—Where plaintiff rented certain land, and, after planting the crop the tenant was taken sick, and defendant bought the crop from him, and agreed to pay plaintiff the rent due, the agreement was an original undertaking not required to be in writing under the statute of frauds.—Pylant v. Webb, Ga., 58 S. E. Rep. 329.

142 STATUTES—Acts Relating to More Than One Subject.—Statutes classifying an action for the annulment of a marriage with an action for divorce are not in violation of the constitutional requirement that no bill shall embrace more than one subject, which shall be expressed in its title; the subject of the annulment of marriage being germane to that of divorce.—Piper v. Piper, Wash., 91 Pac. Rep. 159.

143. STREET RAILROADS—Contributory Negligence.—A person about to cross a street at a crossing is not bound to wait because a car is in sight but, if the car is at such a distance that he has time to cross, if it is run at the usual speed, it is not negligence as a matter of law, to attempt to do so.—Wolf v. City Ry. Co., Oreg., 91 Pac. Rep. 460.

144. TAXATION — Back Tax Proceedings.— Where a county trustee erroneously refused to take jurisdiction of a proceeding by a revenue agent to compel the back assessment of taxes on the property of a street railway company because of the alleged want of jurisdiction, mandamus was the proper remedy to compel him to act.—State v. Taylor, Tenn., 104 S. W. Rep. 242.

145. TENANCY IN COMMON—Construction of Deed.—Where a grantor conveys the fee in land to himself and others, he becomes a tenant in common with the grantee.—Green v. Cannady, S. Car., 57 S. E. Rep. 832.

146. TROVER AND CONVERSION—Title in Third Person. A superior title in third person held no defense to detinue or trover where both plaintiff and defendant claim title through a common source, though plaintiff did not show possession and relied solely on title.—Pruitt v. Gunn, Ala., 44 So. Rep. 569.

147. TRUSTS—Constructive Trusts.—A parol agreement by which complainant claimed he advanced money to defendant to purchase the interest of defendant's partner in defendant's name and hold the same for complainant's benefit held insufficient to create a constructive trust of the interest so purchased for complainant.—Butts v. Cooper, Ala., 44 So. Rep. 616.

148. TRUSTS—Resulting Trusts.—A resulting trust in land does not arise in favor of one who paid no part of the consideration therefor on its conveyance to another, though it may have been the common understanding that the debt incurred for a part of the purchase price and secured by a mortgage thereon was to be regarded as his debt, and that on his paying it, title to the land would be made to him.—Crawford v. Crawford, S. Car. 57 S. E. Rep. 837.

149. VENUE—Action on Bill of Lading.—A railroad company which has agreed to deliver goods to a connecting carrier, and does deliver a portion, the remainder being lost, may be sued for the shortage in the county in which it undertook to deliver to the connecting carrier.—Askew & Co. v. Southern Ry. Co., Ga., 58 S. E. Rep. 242.

150. VENUE—Transitory Action.—An action to compel a depositary of stock in a mining corporation and the pledgee to deliver the same to plaintiff was a transitory action and not local as involving a controversy over real property.—Eddy v. Houghton, Cal., 91 Pac. Rep. 397.